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Where do they speak from? Positions about the new IMF contractual proposal for ordering sovereign debt restructurings

¿Desde onde falam? Posições em torno da nova proposta contratual do FMI para ordenar as reestruturações da dívida soberana

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Resumo

O debate sobre Reestruturações da Dívida Soberana (RDS) está no centro da agenda de políticas econômicas globais. Em 2014, o FMI apresentou uma nova proposta contratual –como parte integrante de um conjunto de reformas– para organizar esses processos e permaneceu fora das discussões destinadas a elaborar um mecanismo estatutário dentro da ONU, o que acentuou as divisões existentes neste campo. Ao contrário da maior parte da literatura especializada que analisa os limites e potencialidades desta proposta do FMI em termos abstratos, este artigo faz isso através de um «*jogo* de posições nas disputas». Esta nova maneira de abordar o debate sobre RDS, que começa explicitando os pressupostos e os interesses *desde onde os agentes falam* neste campo, possibilita explicar por que existem não só opiniões diferentes, mas diretamente opostas, sobre o mesmo fato social (a nova iniciativa do FMI). Argumenta-se que esta proposta supera os modelos contratuais existentes, mas deixa aberto uma margem de incerteza sobre a correta organização das reestruturações futuras: a profundidade e as implicações de tal incerteza no mercado da dívida soberana assumem significados particularmente diferentes de acordo com a cosmovisão de cada uma das posições abordadas.

Palavras-chave: Reestruturação da dívida soberana (RDS); Fundo monetário internacional (FMI); Cláusulas de ação coletiva (CACs); Cláusulas Pari Passu.

Abstract

The Sovereign Debt Restructuring (SDR) debate is at the center of the global economic political agenda. In 2014, the IMF issued a new contractual proposal –as an integral part of a set of reforms– to organize these processes but remained outside of the discussions that promoted the creation of an SDR statutory mechanism at the UN, something which marked the existing divisions in the SDR field. Unlike specialized scholars that analyze the limits and potentialities of the IMF contractual proposal *in abstracto*, this article does it by means of a «*game* of positions in dispute». This new way of approaching the SDR debate, which starts by making explicit the assumption and interests *from where the agents* in this field speak, helps to explain why there are not only diverse but directly opposite opinions about the same social fact (the IMF new proposal). It is argued that this proposal improves the existing models of contractual clauses, but it leaves a margin of uncertainty about the correct organization of future restructuring processes: the depth and implications of this uncertainty in the sovereign debt market acquire particularly different meanings according to the worldview of each of the addressed positions.

Keywords: Sovereign debt restructuring (SDR); International monetary fund (IMF); United nations (UN); Collective action clauses (CACs); Pari Passu Clauses.

I - Introduction

Discussions about the correct ordering of Sovereign Debt Restructurings (SDRs) are once again at the center of the global economic political agenda (Bohoslavsky 2016). The cases of Greece and Argentina had wide international impact. In 2013, the IMF issued a report which pointed out failures in the manner of currently conducting these processes (IMF 2013a). Then, together with working groups of the USA Treasury and the International Capital Market Association (ICMA), the Fund began updating its framework for dealing with restructurings. The main advancement of this process was shown in a 2014 report which basically introduced new models of collective action (CACs) and *pari passu* clauses (IMF 2014b).

The proposal generated an intense debate, which became more complex with the entrance of new players in the discussion that promoted the creation of an SDR statutory mechanism at the UN (UNCTAD 2015; A/RES/68/304 2014; Gelpern 2016). In this scenario, it is possible to find not only different but also opposite opinions about the new contractual clauses: some commentators qualify the IMF initiative as pro-debtor (PIIE 2014, 31, Hung Tran) and others as pro-creditor (Alvarez and Adelarde 2015; PIIE 2014, 33–34, A. Gelpner); many analysts argue that this proposal intervenes in a nonexistent problem (Mooney 2015, 68), while others hold it does so in only one of the multiple SDR existing problems (J. E. Stiglitz et al. 2014); some observers present the initiative as the result of a particularly democratic process (Hagan 2014, 1) and others see it as part of an essentially exclusionary one (Brooks et al. 2015, 8; Stichelmans 2015, 9–10); finally, some commentators believe that the changes proposed by the IMF are superficial (Alvarez and Adelarde 2015, 17), while others consider that it has taken a "big step forward" (Gelpner 2014, 3). How can such different positions coexist concerning the same social fact? Or more specifically: where do these observers speak from?

This article analyzes the potentialities and limits of the new IMF proposal –(IMF 2014b)– by means of a «*game* of positions in dispute» (Bourdieu 2008; Bourdieu 2000). In this sense, scholars specialized in international political economy have stated that the definition of how, when and to what amount should sovereign debts be restructured is an essentially «political or ideological» issue (Brooks and Lombardi 2015, 7; PIIE 2014, 34, Anne Gelpner). In this paper, the image of the academic field as a neutral and ascetic space of inter-individual relations –the idealized image of the "academic community"– is replaced by the image of a space in/of dispute, in which different social agents compete to impose their own worldview as *the* legitimate worldview. This field, relatively autonomous of the rest of the social universe, is organized around positions which are structurally and historically defined one in relation to the others (Bourdieu 2008). Each position lies on diverse interests and has a relatively distinctive way of thinking about the financial market (its agents, institutions and relations with other social spaces) without which its visibility –it is believed– is impossible to understand the SDR debate in a comprehensive way.

The literature shows this debate in dichotomous terms. Indeed, the debate appears organized around two antagonistic positions which are defined according to the «type of regulative modality» that they promote in order to organize SDRs; this is to say, a debate between "*contractualists* vs. *statutorists*" (Hofmann 2014). Thus, the new IMF proposal is seen as a triumph of the first over the second position (Makoff and Kahn 2015, 3), as represented in a concrete way by the referred UN Committee, whose work ended in 2015 without having drafted the planned statutory mechanism, but listing a set of SDR guiding principles (A/RES/69/319 2015).

Table 1

Redefining SDRs debate: dimensions and positions in dispute

Regulative modality / IMF framework for SDRs	**Contractual**	**Statutory**[1]
Internal to the IMF framework	Contractual *internalist*	Statutory *internalist*
External to the IMF framework	Contractual *externalist*	Statutory *externalist*

Table made by the author.

[1] In fact, a SDR "non-contractual" mechanism could be set by means of a set of different regulative modalities (ex. "statute", "convention", "treaty", etc). For practical reasons, this article uses the word "statutory" (the most used in the literature) to refer to all of these modalities, even knowing that technically them have different meanings.

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This dichotomous image of the debate is judged incomplete. Bolton noted, in this sense, that among the opponents to the statutory approach coexist two positions with different but not easily reconcilable perspectives (Bolton 2003, 49 and 60). While some agents support the contractual approach because of its efficiency at the time of ordering SDRs, others do so because of its inefficiency: in effect, whilst –Bolton observes– the *contractualists* of the former position argue that this approach already delivers most of the benefits of a statutory approach, the *contractualists* of the latter position believe that, under its influence, SDRs will be highly costly, something which they deem as positive and desirable since it imposes discipline on Debtor States (Bolton 2003, 60). The former position became hegemonic at the IMF in the early twenty-first century, so we call it «contractual-*internalist*» position. The latter position is still active and maintains a critical perspective with respect to the Fund SDR framework («contractual-*externalist*» position).

Among the *statutorists* there are also conflictive opinions about this framework. While some pro-statutory approach agents argue that an SDR process supported by an IMF financial program is the best option for a country and the world at the time of avoiding a crisis (A. O. Krueger 2002; A. Krueger 2013), for other *statutorists* such kind of programs not only do not prevent crisis but, on the contrary, cause them (J. Stiglitz 2009). The former, around which we built the «statutory-*internalist*» position, acquired greater visibility in the Anne Krueger proposal about setting a statutory mechanism, named as SDRM, at the IMF (A. O. Krueger 2002), whilst the latter were dominant in the aforementioned UN Committee. These latter ones –which we locate in the «statutory-*externalist*» position–, hold a heterodox conception of the economy (Guzman and Stiglitz 2015).

Thus, the article introduces a new map of the SDR debate. Its originality derives not only from adding new positions to this debate but, mainly, from its own logic of construction. This paper starts with an objectifying process of the academic field directed to analyze the discourse of academicians in the space of the sovereign debt market in order to discover the criteria by means they themselves «identify with» or «differ from» in this space of the field. The analysis of these criteria helps, on the one hand, to justify the dimensions chosen to create the four positions shown in Table 1; on the other, it helps to define these positions with the depth required to address the purpose of the study.

The objective of this article gives centrality to the IMF framework to deal with SDRs. The works which criticize the contractual approach «from outside» the Fund do not explain in depth the main aspects of the proposal they criticize, which has been its evolution nor how it is connected to the rest of the policies and practices that the IMF promotes to organize SDR processes.[2] The works that promote or criticize this approach «from inside» the institution preserve these limits but at the cost of sidelining the contractual nature of its approach or, in more general terms, the assumptions which the framework is based on.[3] This paper attempts to offer an improved picture of the debate by incorporating the strengths of both research groups. In effect, the article defines, firstly, the IMF SDR framework by using IMF official documents and updates it by showing its recent reforms. Secondly, the paper inserts the new models of clauses proposed by the 2014 IMF report in this framework and, summarily, traces their origin and evolution. Only then, thirdly, does the article introduce the criticisms associated to this report –its limits and potentialities– not from only one perspective but from the range of perspectives arising from the referred positions.

It is argued that these limits and potentialities cannot be thought of in absolute or abstract terms. Explaining *from where the commentators speak* in the SDR debate supposes understanding that their opinions on the 2014 IMF report only make sense: a) in the context of their relations with the other positions that structure this academic field; b) considering the assumptions their positions rest on and the interests that guide them. This article shows that the four positions agree in observing that the new models of clauses proposed by the IMF: a) are better than the existing arrangements concerning the ability to manage SDR collective action problems; b) do not have the power to promptly and fully remove the degree of uncertainty that currently exists in the SDR context. Excluding this basic coincidence, it is observed, the four positions offer different narratives about the recent Fund developments in the area of restructuring processes.

[2] For instance, see Brooks et al. (2015).

[3] For instance, see Hagan (2014).

II - Classificatory and defining criteria of the positions in dispute at the SDR debate: justification and conceptualization of the chosen criteria

The academic discourse, materialized in different academic works, is a power discourse. Culture producers have the ability to spread *their own* viewpoint of the world to other sectors of society since their knowledge is perceived by those sectors as legitimate. In the contemporary world, scientific knowledge is exhibited as «the knowledge of all knowledge» as it possesses attributes of objectivity and universality held more accurate than the attributes recognized to other intellectual creations (Bourdieu 2000). In the particular case of the new contractual models, the impact of the academicians who promote such models on the sovereign debt market is magnified because their academic contributions are supported and translated to the international economic policy field by the central players of the global financial governance.

The academic discourse is a discourse *of* power. While in the preceding paragraph the emphasis was laid on the effects of this discourse on the actual world, it is here focused on the conditions which produce it (Torres 2011). The academic field is understood as a field of dispute, where different agents mutually compete in a context of structurally unequal social relations. Unlike the visions that show the *homo academicus* as a disinterested observer, and his work as the result of purely individual inspiration, this article presupposes that objective and independent consciousness conditions mark his very existence. Considering the *homo academicus* as an interested subject does not, by contrast, imply to reduce his conduct to extra-academic social determinants as suggested by some in mechanistic sociology, but to recognize that these determinants are mediated by a field with rules which are relatively autonomous of other social spaces. Intellectual success is never reduced to market success. The degree of autonomy of the academic field of the political and economic fields is always a historical issue (Bourdieu 2002). In the specific case of the new IMF proposal, the academic autonomy is reduced since its content is consulted with official and private agents, knowing that its effectiveness depends on the approval procedure of part of the Fund governing body.

This minor degree of autonomy has effects over the construction of the object of analysis. In this sense, it should be noted that this article analyzes a portion of the social space in which the boundaries between the academic field and the political and the economic fields are diffuse. Even so, it has been decided to locate the object of analysis within the academic field because of the totality of the discourses circulating in society around the new IMF/ICMA proposal we are interested in analyze those discourses existing in the literature that legitimize or criticize the proposal based on a specialized knowledge: those discourses emanating from «specialists» in the area of study of sovereign debt restructurings.

The contrast *contractualists* vs. *statutarists* is commonplace in the literature. Nevertheless, there is not a unique criterion at the time of defining these positions. Some authors construct these ideal types highlighting the "nature of the subject that puts into effect their rules" (contractual-private/voluntary vs. statutory-official/institutional), (Mooney 2015); others stress the "degree of generality" of such rules (contractual-*ad hoc* vs. statutory-general/uniform), (Haley 2014; Bolton and Skeel 2007); some scholars refer to the "kind of economy" that, they understand, these ideal types promote (contractual-market/*laissez fair* vs. statutory/regulative), (Hagan 2014; Ranieri 2015); others think about the "kind of negotiation" that, they believe, these idealized modalities encourage (contractual-decentralized/autonomous vs. statutory-structured) (Bolton and Skeel 2007); finally, many commentators stress "the content", introducing a series of features generally present in statutory proposals but absent in contractual initiatives (Brooks et al. 2015).

This article takes the «degree of autonomy of the contracting parties» as a defining criterion of this conceptual pair. It is a conceptually precise criterion and also flexible enough to include in it the wide range of SDR existing proposals. A statutory mechanism is by definition a «supra-contractual» regulative modality that operates independently of the will of the contracting parties. We here meet a formal criterion of definition which does not invalidate the abovementioned criteria but redefine them according to their own characterization. In effect, a statutory mechanism is "supra-contractual" since it has been approved by an authority with political power above private agents; it is "general" as far as its rules are valid in the areas where such authority exercises its power; finally, it is "regulative" since its rules are mandatory whether they may have or not been incorporated in contracts. By default, a contractual arrangement is "voluntary, decentralized and a market solution" (Gelpner 2014).

The contrast "*internalist* vs. *externalist*" is not usual in the specialized literature. Other classification criteria have been considered. One of them was to construct ideal types taking into account the position of key «authors». This possibility was ruled out since authors rarely follow a totally linear academic path and their opinions can hardly be pigeonholed into one particular position. Bourdieu proposes overcoming this difficulty by differentiating between empirical and epistemic individuals, also called «social agents». These latter are historical abstractions that a researcher defines according to a set of ideal properties which produce effects in a particular field: a scientific concept idealizes a limited number of features of the empirical individuals and makes them equivalent on a level of reality intended to be investigated (Bourdieu 2008, 37). The article is built considering «social agents» and not particular authors, whose positions can be identified with the introduced positions but not be fully reduced to them.

Another possibility was to classify the SDR academic universe considering criteria of differentiation, characteristic of the «USA political field». These criteria are used in those works which analyze the historical disputes related to the drafting of the USA bankruptcy law (Bolton 2003). The idealized position of the authors of the "republican right" is identified with the search of regulations meant to assure strong property rights, and the position of the "democratic left" is rather identified with the inclination to safeguard the interests of certain vulnerable social sectors. This criterion, Bolton rightly explains, cannot be directly extrapolated to the international arena (Bolton 2003, 49). In fact, both Bush (republican) and Obama (democratic) administrations supported models of CACs promoted by the IMF (contractual-*internalist* position). However, the reader should note that certain aspects of the positions in Table 1 can be identified with typical features of the idealized republican and democratic types concerning the weight that the USA has in the global financial governance.

The division «*universalists* vs. *territorialists*» is present in the cross boarder corporate bankruptcies debate (Bernstein 2013). The former propose that these bankruptcies be resolved under the bankruptcy law of a single host jurisdiction, while the latter advocate for the intervention of several jurisdictions. A hypothetical observer could associate the *universalist* with the statutory position and the *territorialist* with the *contractualist* one. However, this is not accurate. There is not an international or domestic bankruptcy law for sovereign debt. Litigations involving Debtor States are substantiated in accordance with the civil or commercial law of a particular jurisdiction. In the case that such kind of law actually existed –something proposed at theoretical level (Makoff 2015)–, the involved parties should agree to submit their conflicts to such law by a statute or contract.

There are «pro-creditor and pro-debtor» positions in the SDR debate (Ugarchete 2007a, 47). There are commentators who believe that *a priori* creditors are the weaker party in sovereign debt negotiations, that the IMF is not a creditor-friendly institution and that the statutory approaches would limit creditors´ rights (PIIE 2014, 29–31; Mooney 2015, 68–69); there are other commentators who believe exactly the opposite (Ugarchete and Acosta 2003). This classificatory criterion is ruled out since these extremes cannot be proved *in abstracto*. There is nothing in the essence of a contractual or statutory regulatory modality that turns it *a priori* into a pro-debtor or pro-creditor modality. Thus, an observer can assert that the new IMF proposal is beneficial to one or another group, depending on the pre-assumptions and the standpoint taken to support the assertion.

Still another possibility was to classify the academic field specialized in sovereign debt market following the idealized positions: «emerging vs. advanced countries» (Montes and Wierzba 2015). At the center of this criterion stands the position of these extremes in relation to the transformation –emerging countries– or conservation –advanced countries– of the current International Financial Architecture (IFA). Recently, this criterion has acquired visibility because the G7 countries and the IMF refused to participate in the UN discussions, promoted by emerging countries (G77 + China), aimed to create a statutory mechanism (Gelpern 2016). While this is appropriate for the analysis of particular cases, it is understood that it cannot be properly extended to all SDR cases: in this sense, for example, it is relevant to note that key academic groups of the G7 countries strongly encouraged the UN process and, on the contrary, the new IMF proposal received the support of emerging countries on its Executive Board.

Finally, the division between «orthodox *vs.* heterodox» economic positions can be found in the specialized literature (Kulfas and Schorr 2003; Lee 2012). At the heart of this differentiation is the opposite consideration about the "self-regulatory logic of the market". While the orthodox ideal type pre-assumes that the financial market tends naturally towards equilibrium and efficiency, the heterodox type argues that this market rarely tends to these extremes in a concrete historical reality (J. Stiglitz 2009). Although key elements of this criterion can be perceived in the *externalist* positions of Table 1, these elements cannot be observed in the differentiation of the two contractual

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positions nor between them and the here so-called statutory-*internalist* position (ex. SDRM-Krueger). This criterion was also dismissed on the grounds that the definition of what «economic mainstream» means is more vague and ambiguous –and therefore more likely to be disputed– than the definition of the category «IMF framework for dealing with SDR» introduced below.

III - The IMF framework for SDRs: new models of CACs and *pari passu* clauses

Since the start of the financial globalization era in the 1970s, the IMF has been playing the leading role in the prevention, management and resolution of financial crises in emerging countries (Ugarchete 2007a; Lee 2012). The Fund participated in the previous restructuring stages via its surveillance functions. The IMF Debt Sustainability Analysis (DSA) is often a key element at the moment of deciding the activation of this kind of processes. Once it is activated, Gelpner explains, the Fund is, *de facto*, the principal designer and arbiter of the restructuring plan, and also determines the role of all other players (PIIE 2014, 23, Gelpner A.). Finally, the IMF is the agent which, in the post-restructuring phase, controls the effectiveness of the process as long as the program signed with the national authorities (3 or 4 years) holds.

Nevertheless, the IMF does not have a unified framework specifically designed for dealing with SDR processes (PIIE 2014, 23, Lombardi D.). This framework arises, in a residual manner (PIIE 2014, 25, Gelpner A.), from the legal frameworks of other areas of interest to the Fund (the reason why we use the word "framework" and not "legal framework" for restructurings). Its content stems from a combination of prescriptions established, at least, in the following "regulative tools": the IMF «articles of agreement», its «conventions» with other forums or financial institutions, and its «reports» and «guidelines» which, on the one hand, organize its lending policy, the DSA and its conditionalities and, on the other, introduce contractual clause models to be incorporated in future debt issue contracts. None of these modalities operate separately; only their articulation in a given historical moment may draw up the content of the referred framework.

The IMF legal frameworks are not fixed. In recent years, the Fund has undergone reforms in almost all its areas (PIIE 2014, 2, Collyns C.). The major part of the structure of the IMF framework for SDRs was built after the financial crises that affected emerging countries in the late 1990s and early 2000s on the basis of the architecture constructed in the post-Bretton Woods period. This structure is currently under review. The Fund is presently going through an updating process –not of substitution– of the policies and institutes established in response to the aforementioned crises.

The 2013 IMF report is central in this process (IMF 2013a). This report sets four priority reform areas in order to improve the current performance of SDR processes; such areas concern: a) collective action problems (ex. CACs); b) lending policy of exceptional access to the IMF resources; c) lending policy in arrears (LIA policy) to official creditors; d) the *good faith* criterion of the LIA policy. The first three reform areas have already been completed; the fourth is still in progress (IMF 2016a). Bellow, the IMF framework for SDRs is introduced, based on the 2013 report (IMF 2013a).

III.1– Key elements of the IMF framework for SDRs.

The IMF Articles of Agreement establish that the Fund must provide financing to help its member-states to solve their balance of payment problems (IMF 2009). When a country faces economic distress, the financing from the Fund –the 2013 Report points out– tends to catalyze spontaneous external financing from the private sector and, in some cases, new financing from the official sector to contribute to the solution of the aforementioned problems. In said cases, a member-state is able to continue to service its debt in accordance with the original terms, without having to restructure it (IMF 2013a, point 5).

However, there are circumstances when this logic is not, *a priori*, viable. A country´s difficulty to have easy market access plus an excessive debt level appear as warning signals for the IMF at the time of committing its resources: the decision is complex, because in these cases the need for financing the balance of payment deficit is often particularly high. Originally, the IMF Articles of Agreement banned financing large deficits. However, Boughton observes, in the 1960s the Fund started, *de facto,* to do it. The transformations which took place in the international financial system after the collapse of the Bretton Woods agreement gradually turned the IMF into a «lender of last resort». By the mid 1990s, exceptional access to the Fund resources (that is, exceeding the amounts ordinarily assigned to its members) was the rule rather than the exception.

The crises, which in this context the emerging markets experienced, opened a wide-ranging debate (Boughton, Brooks, and Lombardi 2014).

The main lesson of this debate for the IMF was that its legal framework for "exceptional access lending" was too permissive. In this sense, before 2002, this access was granted on the basis of an "exceptional circumstances" clause that did not include any substantive criteria (IMF 2015b, point 5). The position which finally prevailed in the Fund was to understand that not all crises were likely to be prevented by means of bailouts; in some circumstances, bailouts were not only not beneficial but the costs for almost all the sovereign debt market players affected by economic distress increased. Following these considerations, in the early twenty-first century, the IMF reformed four keys areas with direct implications on its framework for SDRs.

Firstly, in 2002-2003 the IMF adopted a framework that required countries in crisis to meet four criteria in order to receive very large loans from the Fund. In brief, it was required that the involved country have a large balance of payments need, that a rigorous assessment of the country's debt find the debt burden sustainable with a high degree of probability, that the country have good prospects for regaining market access while IMF resources are outstanding, and that the country's policies in support of the loan were likely to be implemented and to achieve the specified macroeconomic targets (Schadler 2015, 2). This change, which ultimately limited exceptional access to the Fund resources, modified the dynamic of SDR events to the extent that in the cases in which exceptional access to the IMF loan is denied, it is recommended that the country in distress start a restructuring process of its sovereign debt as quickly as possible. While the decision to activate this kind of process is the responsibility of the concerned State government, the Fund recommendation is in practice a sign difficult to ignore as it influences the expectations of all market players (IMF 2013a, point 8).

These criteria were tested during the subsequent years. The 2013 Report analyzed the practical experience of the new IMF legal framework and suggested a review, particularly because of the uncertainty generated by the Greek case, when a fifth *ad hoc* criterion to enable exceptional access to the Fund resources was added in 2010. The review actually took place in 2014-2015 (IMF 2014c; IMF 2015b) and the results were approved by the IMF Executive Board in January 2016 (IMF 2016b). The approved reforms included, firstly, the elimination of the «systemic exemption» introduced in 2010 and, secondly, an increase in flexibility for members where debt is assessed to be sustainable but not with «high probability» (IMF 2016b). With this last reform, the IMF intends to provide incentives to accelerate the times of activation of the restructuring processes for those intermediate cases (or "gray zone" cases) in which a sovereign debt, although not unsustainable, is not deemed fully sustainable. In such cases, the Fund does not recommend a debt reduction in terms of capital and/or interest but to reschedule its maturities, and it provides exceptional financial support for this purpose (IMF 2015b).

Secondly, between 2002 and 2005, the IMF advanced precisely with its framework for measuring the sustainability of a sovereign debt (Schadler 2016). The DSA, by which this measurement is done, should not be thought of in terms of a purely technical tool but as a true methodological and conceptual framework with decisive implications for the activities of the IMF. The DSA, Schandler states, is a framework for analyzing the risks inherent to a country's fiscal policy and level of sovereign indebtedness (Schadler 2016, 3–4). This analysis, which takes different forms depending on whether the country is advanced, emerging or low income (IMF 2011; IMF 2013b), is carried out via a complex operation that takes into account different features of a country's fiscal policy and debt position, both observed currently and projected to several risk scenarios. The data used in this operation come mainly from the information that the Fund collects by means of its annual surveillance missions (Art. IV, Articles of Agreement), (Schadler 2016).

The link between the DSA and SDR processes is manifested in different dimensions. First, when the debt of a country is defined by the IMF as «unsustainable», the financial agents tend to avoid financing the affected economy and, still worse, tend to withdraw their capital until the core problems are resolved. Therefore, this IMF statement impacts on the government's decision to activate a process in order to reduce or reschedule its debt. On the contrary, in absence of such statement, creditors, in a pre-default scenario, can judge a restructuring initiated by a State as unnecessary and, then, refrain from providing support to the process. Secondly, the DSA influences the determination of the amount and type of debt to be restructured and, consequently, its restructuring plan. Thirdly, if this plan is carried out with the support of an IMF financing program, the DSA helps to define its conditionalities (Schadler 2016).

These conditionalities, considered in the IMF Articles of Agreement, are justified in SDR events with the intention of avoiding those policies which led the country to the need of restructuring its debt and redirect it to ensure debt sustainability in the medium and long term. The IMF resources are granted by stages, with the aim of monitoring the actual compliance of the conditionalities on the part of the national authorities following a schedule that can be extended for 3 or 4 years depending on the kind of approved programs. In practice, the Fund often coordinates financial rescue packages with other multilateral or official lenders and, in some cases, also with private actors whose funds are delivered following the aforementioned schedule. The amounts of these packages are strategically fixed at below the financial requirements of the member-state to guarantee that it adjust its fiscal policy for serving its debt. In 2002 and again in 2009, after the global crisis, the Fund's guidelines on conditionality were significantly modified.[4] Since then, conditionalities have been established following a «macro-critical» approach that limits them to those considered strictly necessary in accordance with the core functions of the IMF; they acquire different forms depending on new kinds of facilities and their progress is not monitored by the «structural performance criteria» used until 2009 (IMF 2012). These programs send signals to the players involved in a restructuring process. A negative or successful review of an IMF program can influence the degree of support given by creditors to this process or affect debt sustainability in a post-restructuring scenario (A. O. Krueger and Hagan 2005).

Thirdly, in 1999, the IMF revised its 1989 «non-toleration policy» to expand its capacity to provide financing in post-default contexts (IMF 1999). The Fund always recommends that the member avoid default: "avoiding a default –the 2013 Report states– is important not only because it may exacerbate the immediate economic and financial dislocation, but also because it may undermine the member's capacity to re–access international private capital in the medium term, which, (…) is a key requirement for Fund lending" (IMF 2013a, point 15). In pre-default contexts the State initiates a "preemptive" debt restructuring, in terms of the IMF, and continues to serve its debt during the process. Because speed is of the essence in preemptive cases, the IMF does not require a particular form of dialogue between creditors and the debtor and acknowledges that a non-negotiated offer, albeit following informal consultations with creditors, may be the most efficient way to proceed (IMF 2013a). The recent flexibility of the IMF exceptional access framework specifically seeks to promote preemptive debt

[4] See, IMF Factsheet, "IMF Conditionality", March 24, 2016, https://www.imf.org/external/np/exr/facts/conditio.htm, (visited August 10, 2016).

restructurings considering that it is preferable to assume the risk of committing resources even in cases where debt sustainability is not judged with «high probability», in the hope that a timely debt reschedule may prevent default and the possible spread of the economic distress situation of the restructuring State to other related markets (IMF 2015b).

However, there are circumstances when default is inevitable. Originally, the IMF did not grant financing to its member-states until they did not cancel arrears with its creditors ("non-toleration policy"). In 1989, for commercial banks, and later, in 1999, for all external private creditors,[5] the Fund relaxed this policy to avoid situations where such creditors may exercise a veto over Fund lending decisions. The LIA policy seeks to support effective adjustments while facilitating orderly debt restructuring to restore external viability. The LIA policy applies only when judgment has been made so that (i) prompt Fund support is considered essential for the successful implementation of the member's adjustment program, and (ii) the member pursues appropriate policies and makes a "good faith effort" to reach a collaborative agreement with its private creditors (IMF 1999). Unlike preemptive debt restructurings, in the post-default cases the Fund sets expectations on the form of the dialogue between the debtor and its creditors, which need to be consistent with the good-faith effort (IMF 2013a, point 16). The 2013 report considered necessary to review these expectations (review that is currently underway), (IMF 2016a).

As a general principle, the IMF does not grant financial support to member-states who are in arrears with official or multilateral creditors (Fund's policy on non–toleration of arrears to official creditors, 1989), (IMF 1999). This asymmetry with respect to private creditors is justified in the IMF view, which argues that official and multilateral creditors make investments for public interests and assist distressed Debtor States when private agents leave their markets (IMF 2015a, point 8). The Fund has developed a number of conventions on how this policy of non toleration is applied in practice. These conventions ultimately relax it and seek not to obstruct a possible IMF support to a restructuring plan. Indeed, a) arrears with the IMF itself or with the World Bank are considered resolved if the program provides for their clearance (IMF–WB concordat 1989); b) arrears with official creditors of the Paris Club are considered resolved for IMF

[5] The LIA policy applies to (i) sovereign arrears to external private creditors and (ii) non sovereign arrears to external private creditors stemming from the imposition of exchange controls (IMF 1999).

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purposes when financing assurances are received from the Paris Club prior to the approval of a request for use of Fund resources; c) in cases where there is no formal Paris Club Agreed Minute, tacit approval of an official bilateral creditor has been deemed sufficient to satisfy the Fund’s arrears policy.[6] At the request of the 2013 Report, in December 2015 the IMF Executive Board decided to modify its policy on non-toleration (IMF 2015c). In line with the mentioned flexibility, the reform of 2015 allows the IMF, in certain circumstances, to lend to a member-state in arrears with official creditors and, in consequence, collaborate in an orderly debt restructuring process.[7]

Fourthly, in 2002-2003 and concomitantly with other forums (G10, IIF, European Community), the IMF promoted models of contractual clauses for dealing with holdouts or dissenting creditor problems (M. Weidemaier and Gulati 2013). These models are under review. In this sense, the 2013 Report stated: “while creditor participation has been adequate in recent restructurings, the current contractual, market-based approach to debt restructuring is becoming less potent in overcoming collective action problems” (IMF 2013a, 2). The report of October 1, 2014 (hereinafter, 2014 Report), as shown below, is the main IMF's response to this observation (IMF 2014b).

III.2– Summary of the new IMF proposal for dealing with holdout problems

When a State cannot honor its debts, refinancing or reducing it is promoted. However, in the current circumstances, debt restructuring cannot be imposed on creditors. In other words, no change in the original terms of a debt contract can become effective until the new terms have not been voluntarily accepted by creditors. In the case of SDR processes that usually involve not one but hundreds or thousands of creditors, dissident creditor (or holdout) conflicts arise, which involves, at least, the

[6] “Such tacit approval is generally conveyed through non–objection in the Executive Board when the member’s request for Fund financial support is discussed, notwithstanding the arrears” (IMF 2013a, point 17).

[7] The new policy lists the necessary conditions that will allow the IMF to consider lending to those countries in default on official debt: 1) prompt financial support from the Fund is determined to be essential and the country is pursuing appropriate policies; 2) the Paris Club has not provided financing assurances, or a Paris Club Agreed Minute does not exist; 3) the IMF assesses the debtor is making good faith efforts and the official creditor is a holdout; 4) the IMF assesses that the decision to lend into arrears would not have an undue negative effect on the Fund’s ability to mobilize official financing in the future. IMF “Daily News”: “IMF presents its policy on lending into arrears to official creditors”, December 11, 2015, http://concorde.ua/en/research/daily/imf-presents-its-policy-on-lending-arrears-to-official-14853/, (visited September 9, 2016).

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following questions: Should the restructuring offer be accepted by 100% of creditors or is there some way of organizing their consent in a collective form? Can just one creditor block or obstruct an SDR agreement reached with thousands of other creditors? Which is the way in cases when a majority of creditors discriminate against a minority with specific characteristics? Can a group of creditors collect 100% of their credits and another group is made a significant reduction on theirs?

These questions, here theoretically introduced, have obtained different responses in recent restructurings, in some cases with a high cost for many of the players involved. The 2014 Report intends to find a satisfactory solution to this problem; basically, by promoting new contents and/or interpretations of the *pari passu* clauses and CACs in future sovereign debt issuances (IMF 2014b).

The *pari passu* clause, used at least since the early twentieth century, acquired a special significance over recent years. Judgments against Debtor States are difficult to enforce in court because of their sovereign character. The *pari passu* clause became, in the late 1990s, a *sui generis* alternative to enforce them (M. C. Weidemaier and Gelpern 2013). The 2014 Report explains that there are, in general terms, two ways of interpreting its meaning and scope. Its traditional and common interpretation refers exclusively to the "ranking" of creditors. Following a series of concrete actions, governments can bring down the ranking and, consequently, the value of a given bond in relation to other bond/bonds issued by the same State. In this interpretation, the *pari passu* clause is precisely a clause designed to protect a group of creditors from a possible discrimination of their claims in favor of other groups among them (IMF 2014b, 10).

The dissenting interpretation is broader. Some, the IMF Report observes, "have argued, however, that the *pari passu* clause reaches further and means a payment obligation which requires the sovereign debtor to pay its creditors on a *pro rata* or 'ratable' basis. Specifically, if a debt is due and payable to a given creditor, the clause will prevent the debtor from making payments to that creditor unless it makes ratable payments to other creditors whose debts are also due and payable" (IMF 2014b, 10). This latter interpretation is the one that courts have followed at the time of turning the *pari passu* clause into a *sui generis* alternative to enforce their judgments. Indeed, once judges have observed that the clause has been transgressed in a particular case, judges order an *injunction* that compel the Debtor State –and the third parties that assist it in paying its debt– to abstain from paying those creditors who have accepted the restructuring offer until the Debtor State comply with the sentence that orders to pay the plaintiff creditors (M. C. Weidemaier and Gelpern 2013).

This type of interpretation and use of the *pari passu* clause, the IMF states, exacerbate the collective action problem and, therefore, increase uncertainty on international financial markets (Guzman and Stiglitz 2015). Hence, the 2014 Report concludes that “based on the uncertainty created around the interpretation of the *pari passu*, its staff holds that *pari passu* clauses should be drafted in a manner that, in accordance with the ICMA Model Clauses, explicitly excludes the obligation to make ratable payments” (IMF 2014b, 15); that is to say, inversely, they must be drafted in a manner which does not lead to an interpretation other than that related to “creditor ranking”.

CACs are directed to organize the consent of creditors concerning a restructuring offer in a collective form. Although CACs, the IMF report states, exhibit a number of different features, the most important one is that which enables a qualified majority of bondholders to bind a dissenting minority to the terms of a State offer, making restructuring more difficult to block. More specifically, CACs allow modifying the financial terms of a certain debt if the State restructuring proposal is supported by a predetermined percentage of creditors (usually, 75%) (IMF 2014b, 16).

CACs have acquired different modalities over recent decades. Typically, they operated «series by series». In sovereign debt contracts, it was stipulated that if a percentage of bondholders (usually 75%) of a particular series accepted the debt restructuring offer, the other bondholders of that series should remain tied to the terms of this offer. “Although existing CACs –the 2014 Report points out– have helped mitigate the collective action problem in SDR, they have not solved the holdout problem (…) they allow the possibility that a creditor, or a group of creditors, can obtain a "blocking position" in a particular series and effectively nullify the operation of CACs in that series” (IMF 2014b, 18).

Hence, some countries (Argentina, Dominican Republic, Greece and Uruguay) drafted CACs with «two-limbs». These models offer a voting structure which requires a qualified majority for each particular series on the one hand, and, on the other, for all series being restructured. The key advantage of these CACs with respect to the previous ones is that they reduce the required support percentage in each series from 75% to

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66.6%, making it more expensive and difficult for holdouts to reach a blocking position. This reduction is compensated by the second required limb: no individual series can be restructured in the absence of a minimum level of support (usually, of 75% or 85%) for all bond series (IMF 2014b, 19).

Although the two-limb aggregation of CACs supposes a welcome improvement, they still allow holdouts to obtain a blocking position: they need over 33.3% of the bonds of a particular series to reach it. "In such cases, –the IMF Report states– the particular holdout series would be excluded from the restructuring, while the restructuring would still hold for other series until the two-limb voting threshold is met. In this scenario, bondholders would not be protected and the restructuring would go forward without including all bond series; then, their incentive to participate would be reduced" (IMF 2014b, 19).

Following said considerations, the IMF, in line with the ICMA Model Clauses, proposed a new voting procedure: the so called «single-limb» procedure. This is the main innovation in the Fund Report. This new procedure requires only one limb to be achieved in future SDRs (in principle, 75%) calculated on an aggregate basis of all affected bond series; in other words, this approach excludes or renders unnecessary the traditional series-by-series vote.

There was, the IMF proposal says, broad consensus among those agents who participated in its design, since this new CAC model would provide a very effective tool to address collective action problems: "By eliminating the requirement of a series-by-series vote (…), a single-limb voting procedure effectively removes the possibility [of holdouts] of obtaining a position of control over a particular issuance to block the restructuring of said issuance" (IMF 2014b, 20).

However, there are cases when flexibility is needed in order to offer different creditors different restructuring terms. In such cases, following the ICMA Model Clauses, the Fund provides two solutions: one of them, when new CACs enable a government to use the «single-limb» voting procedure to conduct separate voting procedures for different groups of bond issuances. "This 'sub-aggregation' feature has the benefit –the 2014 Report notes– of both allowing differentiation among different groups of bondholders while, at the same time, reducing the leverage of a holdout creditor who could undermine a restructuring by obtaining a significant position in a particular bond issuance in one of the groups" (IMF 2014b, 22); the other solution offered is when the single-limb CACs do not imply the disappearance of existing voting procedures. In this sense, the IMF report offers to use «series-by-series» or «two-limb» CACs models when governments consider it appropriate in order to distinguish different kinds of creditors. It suggests, in the latter case, that two-limb CACs utilize the following percentage rates: a) 66.6% for the aggregate voting; b) 50% for each series, to hinder dissident creditors' blocking activities (IMF 2014b, 23).

Thus, it may be seen that the core of the IMF proposal in relation to CACs consists in a new «single-limb» voting procedure. However, in order to avoid the rigidity that could eventually arise, this proposal supports the inclusion, in future sovereign debt contracts, of a menu of voting procedures which includes: a) a single-limb voting procedure with the possibility of «sub-aggregation»; b) a two-limb aggregation voting procedure; c) a traditional series-by-series voting procedure (IMF 2014b, 30).

IV– Different views about the new IMF proposal: a *game* of positions in dispute.

Below, the opinions of commentators of the SDR debate about the briefly described IMF proposal are introduced, not from a unique perspective but in terms of a «*game* of positions». The presentation of the four positions shown in Table 1 is organized considering the following elements: 1) their location in the academic field of sovereign debt market in relation to the chosen dimensions (contractual-statutory and *internalist-externalist*); 2) their relation to other positions in the field; 3) the pre-assumptions and interests related to their opinion about the Fund framework, in general, and the 2014 Report, in particular.

IV.1– Contractual-*internalist* position

The agents in this position promote the contractual approach from within the IMF framework for SDRs. This starting point does not imply that they uncritically adhere to these extremes.[8] Their position can only be thought of in terms of a reaction against

[8] For instance, see Gelpner (2014).

those who promote a statutory approach, first in the early 2000s, in the form of the SDRM, and then in 2014, by way of the UN Assembly.[9]

The IMF, even with its limitations, these agents understand, is and –should be– the leading institution in global governance: it offers a wide range of different goods and services contributing to common global goods and is, at this stage of the historical development of the financial architecture, irreplaceable by another institution (PIIE 2014, 45–49, Ted Truman). The Fund is, unlike the UN, a specific technically appropriate forum, with the required resources to conduct this kind of discussions.[10]

From this perspective, the 2014 Report emerged from a reflexive and particularly participatory building process: “it comes out –Gelpner (who participated in the process) observes– of an intense collaboration between public officials and private sector representatives who managed to agree on a problem, a solution” (Gelpner 2014, 2). Its construction involved a debate of 18 months among different sovereign debt market players.[11] On the contrary, the representatives of this view interpret the UN process as untimely and with limited discussion times.[12]

The initiative represents an incremental change to the *status quo*, something positive for the agents of this perspective (Gelpner 2014; G30 2002). This is so because «gradualism» generates certainty in the financial system and facilitates the construction of agreements among its participants. Comparatively –they believe–, a statutory change would be a radical and risky step which could have unforeseeable consequences: if private lenders perceive that the wording of a statutory mechanism could harm their interests, they will increase borrowing costs and limit the flow of currency towards emerging markets with negative consequences for the entire global economy (G30 2002).

Unlike a statutory proposal, the IMF initiative –the representatives of this position claim– is politically feasible (Gelpern 2013; Hagan 2014). The incorporation of

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[9] This position does not make a difference between the statutory mechanism proposed in 2001/3 by Krueger and those mechanisms proposed in 2014 at the UN; in other words, both instances are presented as part of the same historical process. See, for instance Hagan (2014).

[10] See the arguments of those countries who voted negatively at the UN General Assembly, (A/RES/68/304 2014).

[11] “On the design –the Director of the IMF Legal Department explains– for the last 18 months we have been discussing the design of these clauses with market participants, issuers, and the official sector” (Hagan 2014, 1).

[12] See the arguments of those countries who voted negatively at the UN General Assembly, (A/RES/68/304 2014).

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the proposed models of clauses in future debt contracts is voluntary. The initiative is based on a broad consensus and, in particular, has the support of creditors. The latter represent the collective subject to consult and convince: "We understood –the Director of the IMF Legal Department says– that, since this approach is market-based, not surprisingly, it requires consultation with the market (…). The degree to which these provisions have been embraced by the market reflect the fact that creditors understand that it's in their interest (…). These CACs don't shift legal leverage from the creditors to the debtor. Rather, they can be understood as shifting legal leverage from individual creditors to creditors as a group. So it gives creditors, as a group, greater control over the process" (Hagan 2014, 1–2).

In this view, the benefits of the new proposed models are shown and valued in relation to the existing clause models. Its promoters consider that the new initiative, as it standardizes the wording of the *pari passu* clauses in models supported by the IMF and the ICMA (IMF 2014b), contributes to provide greater predictability for future financial practices. In particular, the 2014 Report aims to minimize the concerns created by the Court of New York decisions in "NML Capital vs. Argentina" case: "creditors may not be willing to participate in a future restructuring –the Report warns– unless they are assured that the stream of payments owed to them under the restructured debt will not be susceptible to interruption by [legal] actions taken by holdout creditors, actions quite similar to those taken by the holdout creditors in the case of Argentina" (IMF 2014b, 35). The proposal seeks to minimize this risk, firstly, by introducing models that specifically adhere to the restrictive interpretation of the *pari passu* clause (ranking of creditors) and, secondly, by recommending that the United States amend its Foreign Sovereign Immunities Act (FSIA), making clear that *injunctions* cannot be used to attack a restructuring offer made by a Debtor State (IMF 2014b, 35).

The "single-limb" CACs are judged, following this perspective, better than the "series-by-series" and "two-limb" CACs at the time of addressing collective action problems (IMF 2014b). By aggregating all the bond series in the same voting procedure, dissenting creditors must amass a substantially greater amount of bonds than in the past to block it: in economic terms, Makoff and Kahn state, the holdout strategy takes a particularly high operational and financial risk when dissident creditors need to become "the largest creditor" of a State to block its restructuring (Makoff and Kahn 2015, 4). Even in cases when the Debtor State chooses another form of voting ("single-limb with sub-aggregation", "series-by-series" or "two-limb"), the success chances of a holdout strategy are minimized in the new proposed scheme. This is so to the extent that such election is exercised before the restructuring offer is communicated to the public, making difficult for a dissident investor to predict in advance which of the voting procedures will actually be used and, consequently, buy the appropriate bond type and amount to carry out a holdout strategy (Makoff and Kahn 2015, 4–5).

The holders of this position perceive a number of challenges/risks to ensure that the proposed initiative works properly. First of all emerge the issue of the «diffusion of the new models» and «the stock of existing bonds». The contractual approach, unlike the statutory, does not produce immediate effects. The designed models will be effective only if they are incorporated by the interested parties in their future debt issuances and, in that sense –as the Director of the IMF Legal Department recognizes– the function of the institution "is necessarily limited" (Hagan 2014, 1), but –we add– it is relevant considering its experience with former clauses. The wide attention that the Argentinean case had is highlighted as a factor that can help to the rapid spread of the new models (Gelpner 2014).

However, and assuming that these models had actually been welcomed by the market players, the question arises: how about the bonds already issued? The initiative, given its contractual nature, does not apply to them. According to the 2014 Report, the outstanding stock of existing bonds is of approximately 900 billion dollars (IMF 2014b, 33): the period (which the IMF itself estimates in about 10 years) (IMF 2014b) that is still left until the expiration of this significant stock of bonds represents –in the words of the IMF authorities– "a risk" to the proper organization of SDRs (IMF 2014a, 2).

This risk acquires, in this position, distinctive characteristics depending on whether the clauses are *pari passu* or CACs. With the *pari passu*, the success of SDR processes that include bonds of the existing stock –the IMF states– "will depend, largely, on how the courts interpret *pari passu* clauses in future litigations. In particular, if the New York Court decisions are interpreted broadly, there is a significant risk that the restructuring process may be hurt by these clauses. If, however, the New York Court decisions are interpreted more strictly, the risks will be mitigated" (IMF 2014b, 34). The Argentinean case is perceived as a relevant precedent in this context, although the size of this precedent cannot be –in this view– predicted with certainty taking into account the particularities surrounding the case (Hagan 2014). In the case of CACs, the agents

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who promote the new CAC models recognize that injustice instances can occur during this transition period: in effect, Makoff and Kahn explain, bondholders in the same conditions can receive significantly different treatment in the same restructuring process by the mere fact that their bonds have CACs worded differently (Makoff and Kahn 2015, 6). To limit this risk, the IMF recommends replacing the old bonds for new bonds which include the proposed CACs models (Makoff and Kahn 2015; IMF 2014b).

Secondly, the 2014 Report analyzes the risk that the new voting procedure may cause inequality between groups of creditors. To address this concern, the IMF proposal prescribed that, "in circumstances where the sovereign issuer wishes to utilize a single-limb voting procedure, it could do so only if all affected bondholders are offered the same [restructuring] instrument or an identical menu of instruments" (IMF 2014b, 21). With the same objective, the Fund warns that the Debtor State should act with transparency and provide, prior to making a restructuring offer, creditors with adequate information about the qualities of the process, the way it will be carried out and, in particular, about the content of CACs (IMF 2014b, 25). In addition, the IMF initiative promotes the inclusion of "covenant information" in debt contracts. By this covenant, the Debtor State commits itself to providing creditors with data about its economic and financial situation and its government programs (IMF 2014b, 25 and 31).

Thirdly and closely linked to the former point, the so-called 'minority problem'[13] emerges: some experts and analysts have suggested that the single-limb voting procedure, because it cuts across all bond series, may affect democratic values and fair treatment under certain circumstances, when the decision of a creditor majority discriminates against a dissident minority (FMLC 2015, 5). In such instances, the IMF proposal compels the Debtor State to act in good faith (IMF 2014b, 26). In cases of ill faith, the affected minorities could request the judges, of the jurisdictions prescribed in its bonds, to intervene in order to safeguard their rights and interests (FMLC 2015, 8).

Finally, this position considers the "risk of abuse of power": during the discussions, the Fund report points out, creditors stated their concern about the possibility that a sovereign debtor manipulates the voting process by exercising influence on the control entities (IMF 2014b, 26). Thus, the institution proposes,

[13] "One of the biggest potential risks of aggregation is that it may provide an opportunity for the debtor and a qualified majority of creditors to discriminate against a minority of creditors who, although they do not support the proposed agreement, will be bound by its terms" (IMF 2003, 15).

according to the ICMA clause models, robust "disenfranchisement" provisions to exclude from voting all the bonds owned or controlled directly or indirectly by the sovereign issuer or by its public sector instrumentalities (IMF 2014b, 26).

IV.2– Contractual–*externalist* position

Those holding this perspective promote the contractual approach from an external position to the IMF framework for SDRs. They pre-assume «market efficiency»: the market is understood as a self-regulated social order mechanism that, following its own logic, tends to balance. Concerning restructuring processes, the basic premise these agents set off from is the one which considers that the market "is able to solve by itself the sovereign debt problems" (Krueger, quoted by Alvarez and Adelarde 2015, 18). More importantly, the market «should be» the one who solves them.

At the center of the sovereign debt market, an inter-dependent relationship between "lenders-creditors" and "states-debtors" is introduced. The *contractual-externalists* are not, in the SDR debate, an equidistant voice between these extremes: their position represents the voice of the private agents or, simply, the voice of «the market».[14] This statement does not imply ignoring the existence of other participant agents in the financial system (IMF, official sector, academicians, lawyers, etc.): the fact is that –in this view– when these agents intervene in the system, playing a role different from that suppliers or demanders of money, they do it from a secondary and exogenous place to such essential relationship of the sovereign debt market (Mooney 2015; PIIE 2014, 29, Hung Tran). Nor does this statement imply that this position seeks the welfare of creditors in a selfish way. For its promoters, there is an alignment between the interests of this collective group, those of the official sector (in particular, of the USA/the-G7 official sector) and the interests of the global financial system, so that if the interests of creditors are promoted by means of the free market logic, a virtuous circle resulting in overall benefits occurs (Shapiro and Pham 2009). In the field of the SDR debate, this position is located comparatively far from the statutory positions, so that its agents, in particular circumstances, can support a contractual IMF initiative, not because

[14] See, for example, how the 2014 Report itself refers to private financial agents (IMF 2014b).

of a deep coincidence with its pre-assumptions, but to avoid greater evil (that is, the possible wording of a statutory mechanism).

Contracts are, from this perspective, the regulative modality of the market *par excellence* (Bolton 2003, 59). Suppliers and demanders, in decentralized manner, negotiate their rights and obligations without the intervention of a third party. Consequently, contracts do not interfere with the self-regulatory dynamic of the market. In the sovereign debt market, the exchange good is ultimately «money»; contracts regulate money property rights. Once a contract has been drafted, the parties are governed by its rules. These rules, of course, are expected to be respected. The agents of this position carry this general principle to an extreme: in the view of many market participants –the G-10 Working Group observes– (…) the obligation to repay [a sovereign debt] should be considered almost as "sacred" by the debtor" (G10 1996, 11).

However, there are circumstances when the debtor's payment capacity is in doubt. In these circumstances, the market, represented by the contracting parties, is who should approve the modifications in the contract original terms (PIIE 2014, 29–32, Hung Tran). Nevertheless, for this perspective, there is a gap between the market ability to order restructuring processes hypothetically and in practice: indeed, these agents argue that in practice the ideal market efficiency to organize SDR processes has been, over recent years, undermined by means of interventions and situations which have weakened «market discipline» and «creditors´ rights» (Scott 2006). It is here, precisely, where the core of the criticisms of this position towards the IMF is found: the Fund, it is estimated, has contributed to such undermining (Scott 2006, 17).

The IMF –the agents of this position state– does not «understand», «value» or «fully trust» the market. The Fund does not «understand» it, since the Fund relates to the market externally: that is to say, the IMF does not know in depth the logic that governs markets because the IMF does not *live* its practices daily (PIIE 2014, 8, Minovi Maziar). In particular, the Fund has not internalized the profound changes of the financial globalization and largely continues to behave as in the 1980s when the sovereign debt market was organized around an identifiable set of large commercial banks (PIIE 2014, 13, Lerrick Adam). Considering it is the private agents who set in motion the vast majority of the resources in the sovereign debt market, the IMF does not «value» the market –in this perspective– when it does not grant it the weight that it should have in the SDR debate: "to the extent that we [the private agents] –the managing director of Goldman Sachs Investment Management says– are involved in the capital of flows that both create crises and hopefully prevent them (…), hopefully we can add some value [to the SDR debate]" (PIIE 2014, 9, Minovi Maziar). The IMF does not «fully trust» the market, since –these agents observe– its authorities are always measuring up what and how much information should be given to the market participants for fear that such information can make them fly a distress country. This proceeding –it is here understood– is a logical consequence of the distorted image of the market that the IMF has: the market is viewed –a former executive of Salomon Brothers metaphorically says– by the official sector as a "big, stupid and easily frightened" animal that, therefore, is potentially harmful "to everyone around it".[15]

Following these assumptions, the IMF involvement in crises is judged –in this position– as inadequate. In the first place, this perspective calls into question the concept of "crisis prevention" itself. Crises, even considering their cost, play a positive role in the economic system in the medium or long term. Their prevention, it is argued, can alter the market signals, maintaining inefficient political and financial practices over time.[16] Secondly, these agents consider that the Fund interventions should be directed exclusively to facilitate «market discipline». The IMF should not try, as it intends, to control it. The Fund should collaborate and work *with* the market using tools to encourage or punish the participants´ behavior, providing as much information as possible so that these participants can strategically act and accept the cost of their mistakes when their conducts are wrong. The opposite route –Adam Lerrick concludes– is not going to prevent crises; it is only going, as it actually happens, to make them more severe and more frequent (PIIE 2014, 13, Lerrick Adam).

In this scenario, contractual-*externalists* object some of the pillars of the IMF framework for SDRs. The permissive lending policy of the Fund –Scott argues– undermined market discipline in the 1990s: the IMF should, therefore, put more

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15 Adam Lerrick said: "I remembered when I was five years old my father sent me into the barn to start taking care of the horses by myself. He said "always remember horses are very big, very strong, not very intelligent, and easily frightened. And that makes them a danger to themselves and to others." That's the way the official sector views markets. They're big, strong, stupid, and easily frightened. Therefore, they are danger to everyone around them", (PIIE 2014, 13).

16 "In preparation for today, Maziar said, I thought I'd look around my colleagues in the market and ask them what thoughts and ideas they had about improving IMF surveillance and crisis prevention. About 70 percent of the reaction was just a blank stare back. "What do you mean? That's not a concept anybody really focuses on (…) (crises) are good things. If it wasn't for crises, we wouldn't be in business" (PIIE 2014, 8).

emphasis on an anti-bailout approach and not promote its lending catalytic effect (Scott 2006, 17 and 27). In particular, this position: a) welcomes the IMF legal framework for "exceptional access lending" created in 2002. The point is that the criteria of this framework are not met in practice, when the debtor is a State of intermediate development (ex. Greece or Argentina). Consequently, the Fund should create greater institutional barriers for exceptionally accessing its resources rather than facilitating it (Scott 2006, 43), as its latest reform does (IMF 2015b);[17] b) understands negatively the ability of the IMF to lend debtors in arrears (a nice term, Scott ironically observes, for referring to "default"), (Scott 2006, 19). The LIA framework of 1989/1999 is deemed inadequate since it differentiates between private and official sectors.[18] Credits from governments and multilateral agencies –it is considered– should not be privileged. The recent modification of this framework –(IMF 2015a)– which restricts the difference between those two sectors is assessed as positive but partial;[19] c) welcomes the reduction of the IMF conditionalities of the early 2000s (Scott 2006). In this perspective, it is the market (and not the official sector) who should reward or punish appropriate or inappropriate government policies (Meltzer 2000). Nevertheless, private agents emphasize that the useful aspects of IMF practices (in terms of surveillance, for instance) are enhanced when the IMF holds an active program with a State in distress (PIIE 2014, 9, Minovi Maziar) and they judge as positive, although clearly insufficient, the Fund tools which help to discipline debtors distancing from good financial practices (Shapiro and Pham 2009).

With specific regards to the 2014 Report, the opinions of the agents of this position can be taken to be two: in relation to *pari passu* clauses and in relation to CACs. Their viewpoint in the case of the former clauses is better understood if the following question is made: what can be done to make a Debtor State best meet its commitments or, inversely, what tools have creditors to enforce their rights? These agents consider that the answer to this question does not favor creditors: States suffer very little the consequences of default or, in other words, there are no effective enforcement

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[17] This opinion is deduced by the author of this article following an analogy process through which he extends the general rationale of the contractual-*externalists* to the concrete case of the quoted new reform.

[18] Susan Schadler explains how the removal of the *de facto* IMF lending privileged position would contribute to market discipline (PIIE 2014, 28).

[19] This opinion is deduced by the author of this article, following an analogy process through which he extends the general rationale of the contractual-*externalists* to the concrete case of the quoted new reform.

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mechanisms (Scott 2006). From this perspective, this situation –which in the short run clearly harms this collective subject–, is not good for the global system in general because it is not properly seen in «market signals» (Buchheit, Gelpern, and Gulati 2013). The IMF has contributed to this situation. In a market economy –it is argued–, the price and amount of financing are related to the sovereign risk and this risk, in turn, to the cost in case of non-compliance. When market intervention makes the cost of default rise or drop, the lending costs should go up or down, correspondingly. If this is not so, the market operates out of balance, generating situations of sovereign under- or over-borrowing.[20] Over–borrowing is one of the key causes of malfunctioning of the financial system and, in particular, of default: "the only, Scott affirms, effective remedy against sovereign over-borrowing is to allow creditors to enforce their contract rights effectively against sovereigns in default. Any well functioning debt market depends on strong creditor rights" (Scott 2006, 1).

The 2014 Report, as understood in this view, is one more measure of the IMF in a direction opposite to the aforementioned sense (PIIE 2014, 31, Hung Tran). In default cases, creditors –in the form and place their contracts establish– can go to court in order to protect their rights. However, in practice, they have found serious difficulties at the time of enforcing judgments against sovereign States. The 2014 Report, it is judged, weakens creditors' rights: a) by promoting an interpretation of the *pari passu* clause which prevents its utilization as an alternative mechanism for enforcing judgments (PIIE 2014, 29, Hung Tran). The contracting parties, being consenting adults –says the Executive Managing Director of the IIF in this sense–, are the ones who should decide whether to include in their contracts the broad or narrow interpretation of the clause (PIIE 2014, 29, Hung Tran): the way in which the IMF faced this debate –he observes– is very problematic "because it leads to misguided efforts to really weaken creditor rights unnecessarily" (PIIE 2014, 29, Hung Tran). In this scenario, the actions of vulture funds and the decisions of the Courts of New York in the Argentinean case, with regards to these efforts, are perceived by these agents as positive or, at least, as not negative;[21] b) by recommending the amendment of the FSIA for increasing the legal protection of

[20] These concepts are defined in terms of the economic marginalist tradition: "underborrowing—that is, they may be borrowing beyond the point at which the social cost of one additional unit of debt equals the social benefit of an additional unit of debt–financed government expenditure" (Buchheit, Gelpern, and Gulati 2013, 8).

[21] For instance, Alfaro, Noel and Ahmed analyze the actions of the vulture funds in terms of a "regime" to enforce creditors` rights (Ahmed, Alfaro, and Naurer 2010).

sovereign States. These agents understand that such amendment should be applied, precisely, in the opposite sense; that is to say, giving creditors the ability to collect their claims by means of seizing assets of the debtor government and its enterprises, and, in particular, of its central bank reserves. These agents also encourage disciplinary measures on those States that refuse to comply with court decisions or have not acted in accordance with good financial practices (Scott 2006, 1).

This position about the new CACs follows the preceding logic: the new CACs are considered a step further in undermining the rights of creditors (PIIE 2014, 31, Hung Tran). Different from the 2014 Report discourse, this stance considers the IMF concerns about collective action problems exaggerated (Bolton 2003, 61). Some commentators go even further by arguing that SDR processes have in general worked well over the last decades (PIIE 2014, 29–31, Hung Tran), which does not mean that, from this perspective, the SDR organization has been perfect: "No, –the IIF Executive Managing Director states– it's not perfect nor should it be, because breaking contracts is a bad thing, not a good thing, and it should not be made easy or perfect" (PIIE 2014, 29–31, Hung Tran). Similarly, this perspective calls into question whether the IMF proposed models are fully voluntary: "CACs were not, despite the advertising, a market solution. The market [previously] had been free to choose (…). [Currently], what happened is that the U.S. Treasury and the G7 imposed these new CACs on the marketplace to facilitate sovereign restructuring" (Scott 2006, 35).

The agents of this position justify this assertion by comparing the new CACs models not with their preceding models –as the 2014 Report does– but with other types of clauses: CACs facilitate sovereign restructuring from the moment CACs allow modification of the terms of contracts with an adherence rate of 66% or 75%; before 2003, the widespread practice in New York Law bonds was 100% adherence ("unanimous consent"), (Ranieri 2015). Previously, a creditor could individually request the acceleration of a sovereign debt; at present, CACs impose 25% adherence (Scott 2006, 43). From this perspective, these percentages should be abolished or, at least, modified not to weaken the negotiating position of creditors: 90% adherence rather than 75% increases the creditors´ chances of receiving better offers on the part of a Debtor State (Scott 2006). However, it should not be thought that this position has a negative opinion about the «total» 2014 Report: this Report, in fact, incorporates a number of prescriptions (for instance, of transparency, good faith, cooperation, equality, etc.) which debtors should meet during restructuring processes; prescriptions which were being requested over recent years by the agents holding this perspective (Scott 2006).

IV–3 Statutory-*internalist* position

This position promotes a statutory approach from within the IMF. Like *contractualists-internalists*, it is thought that a rapid and ordered process of restructuring is essential at the time of preventing or resolving financial crises; on the other hand, the IMF plays a central role in this task, and should continue to do so (A. Krueger 2013). However, the agents of this perspective argue that the Fund current framework for SDRs does not fully solve the problems that arise in these processes (Haley 2014). The basic premise they start off from is the understanding that this framework makes restructurings unnecessarily expensive for all the good faith parties involved (A. O. Krueger and Hagan 2005, 204): the absence of a statutory mechanism has a negative impact on the smooth functioning of the global financial market and, in particular, prevents the IMF from adequately carrying out its mission (A. O. Krueger and Hagan 2005).

This stance emerged from debates in the early 2000s. The structural transformations that this market suffered in the previous decades reduced, in the 1990s, the effectiveness of the IMF «case-by-case» strategy of the 1980s (A. O. Krueger 2002). In this scenario –Krueger and Hagan state–, a broad consensus emerged: in circumstances of sovereign debt un-sustainability, debtors, creditors and the system in general benefit from restructuring (A. O. Krueger and Hagan 2005, 203). But, this consensus was not extended to the way of organizing these processes. In this sense, the spread of CACs in 2003 is not seen –from this perspective– as part of a fully consented process but as a result of a strategic action on the part of the private sector and of a fraction of the official sector to stop the preparation of the statutory mechanism proposed by Krueger (A. O. Krueger and Hagan 2005, 203–4). This strategic action –it is understood– reduced and turned the complex SDR debate that was taking place into virtually a debate about collective action problems (Bolton and Skeel 2007, 38).

Thus, the IMF framework designed in the early 2000s to organize SDR processes is judged as «residual», «fragmented» and «incomplete». It is «residual» since the institution does not have a legal framework specifically created to deal with these events (PIIE 2014, 25, Gelpner Anne). This absence, Boughton points out, generates "inconsistency [in the IMF practices], which can exacerbate economic uncertainty and unduly politicize crisis management" (Boughton, Brooks, and Lombardi 2014, 7–8). It is «fragmented» to the extent that it arises from a set of reports and guidelines written by different IMF departments in relation to relatively autonomous policies. It is a framework of difficult accessibility for those who are not particularly specialized in the dynamics of the Fund, and its rules are less consistent than those of a hypothetical SDRM, written at one go and contained in only one text (Ranieri 2015, 291). It is «incomplete» because it does not address restructuring processes in a holistic manner. Local bankruptcy laws give direct response to a series of complex questions that the current IMF approach faces only incidentally (Bolton 2003). There are, therefore, gray areas that conspire against the definition of a clear role of the Fund in cases of crisis and make it permeable to pressures of different interested agents (Boughton, Brooks, and Lombardi 2014, 7).

In particular, this view criticizes the basic argument that *contractualists-internalists* use to legitimize their adherence to the contractual approach: this approach, *contractualists-internalists* state, can achieve results of a comparatively similar efficiency to those of a statutory mechanism without the need of having to face such political challenge (Bolton 2003, 60). CACs, *statutarists* state, work properly only in relatively small and homogeneous cases (Bolton and Skeel 2007, 286). When a restructuring process involves a sovereign State with thousands of creditors of different size and structure, with bonds issued in different series and currencies, and governed by several laws and jurisdictions, –as usual on the contemporary sovereign debt market–, CACs, given their own *ad hoc,* voluntary and decentralized nature, lose efficiency (Bolton and Skeel 2007).

The current IMF approach, as here understood, does not reduce the cost of restructuring as it should be expected to do (A. O. Krueger and Hagan 2005, 204). The agents of this stance hold that the greater or lesser extent of the mentioned cost actually exercise influence, although not in a one dimensional form,[22] on sovereign under- or over-borrowing (Bolton 2003, 61). However, in situations of economic distress, expectations of high cost to refinance or reduce a sovereign debt is not reflected in efficient practices as *contractualists* argue: on the contrary, in such cases –*statutarists* claim– the actors involved tend to shy away from the idealized rationale of the *homo economicus,* something which, ultimately, increases the probability of a crisis outbreak and the cost of a possible restructuring process.[23] Consequently, these agents argue that an appropriate framework for SDRs should be provided in order to remove its stigma and help its substantiation by means of a set of uniform and consistent rules to give these processes predictability in all the corresponding steps, something the IMF framework –precisely because of its residual, fragmented and incomplete character – cannot fully achieve (Buchheit, Gelpern, and Gulati 2013).

In this context, *statutarists* stress the issues of SDR «startup times» and «depth» and claim that, in practice, restructuring processes tend to be *too little too late*; something which –they point out– largely reflects the lack of a specific and comprehensive statutory framework (Haley 2014; Bolton 2003). This framework, they argue, should have been designed when the IMF made access to its resources more restrictive: the result of the reform of the early 2000s was, on the one hand, a Fund lending policy that in future would recommend activation of an SDR process as requisite for accessing its exceptional resources and, on the other, the promotion of CACs which do not specifically regulate the beginning of these processes and help only with some of the SDR problems (Bolton and Skeel 2007, 38). In other words, in the early 2000s, the IMF established for itself restrictive criteria of «exceptional access lending» and left in the hands of «the market» the capacity to regulate processes which are activated in moments when the Debtor State and its creditors are going through economic distress which usually makes them abandon the *homo economicus* rationale, required precisely for proper market functioning (Bolton 2003, 61–63). This way, the IMF unnecessarily raises restructurings costs by adding, to their intrinsic costs, the costs derived from a

[22] This statement is relevant because *contractualists* state that if the restructuring cost goes down, restructuring processes would go from being *too little and too late* to being *too much and too early*. *Statutarists* deem this concern as exaggerated and abstract: Debtor States, they argue, will not opportunistically activate these processes because in practice the high cost associated with restructurings is just only one of the many existing deterrent dimensions, and it is the creditors who ultimately approve or not a restructuring offer. See, (Buchheit, Gelpern, and Gulati 2013).

[23] See Bolton's enumeration of the dimensions that move the agents that operate in the sovereign debt market away from the rationale of the *homo economicus* in these situations (Bolton 2003, 61).

framework which does not accelerate, as should be expected, the startup times and leaves unanswered a number of questions that prevent the involved parties from foreseeing that the process they are embarking on will be effective and ordered. Thus, SDR processes lose their capacity to prevent or resolve financial crises with the negative consequences which arise for the system in general and for the IMF in particular. In this context, the latest reform of the Fund lending policy –(IMF 2015b)– is deemed positive but partial.[24]

The contractual approach, *statutarists* observe, does not ensure the participation of the international community in SDRs (A. O. Krueger 2002). Comparative analyses of corporate bankruptcy laws show that the intervention of an impartial third party in a negotiation process whose stages are legally structured is a constant in the different legislations, although the role of the third party and the characteristics of the stages vary depending on the particularities of each domestic system (A. O. Krueger 2002; Bolton 2003). CACs, by their contractual nature, presuppose a decentralized and autonomous relation between a Debtor State and its creditors; *a priori,* there is not in CACs a structuring of the negotiation process or a third party intervention similar to that in the corporate field. When the universe of the debt to be restructured is relatively small and homogeneous, such circumstances –it is here understood– do not seem to be decisive. However, this statement varies when the universe is complex and includes agents of different size, rationale and interests, because of the degree of difficulty this situation generates at the time of coordinating collective actions and the conflicts often arising between debtor/creditors and creditors themselves (A. O. Krueger 2002; Bolton 2003). The IMF involvement in restructurings, as planned in its own framework, is not enough to fill this legal vacuum because its role is not adequately defined and because the Fund is not impartial or has capacities specifically designed to control these processes (G30 2002, 7).

Neither, from this perspective, does the IMF framework establish consistent and enforceable priority rules (Bolton and Skeel 2007). At corporate level, Bolton and Skeel claim, perhaps the most prominent feature of bankruptcy laws is that which enables a company to request bankruptcy in order to obtain a temporary relief from its creditors and to request the permission of the court to obtain new financing, usually from its own

[24] This opinion is deduced by the author of this article, following an analogy process through which he extends the general rationale of the *statutarists-internalists* to the concrete case of the quoted new reform.

creditors, with a clear priority status in order to preserve the value of its assets (Bolton and Skeel 2007, 3). At sovereign level, these possibilities are not regulated. This legal gap is filled in practice by means of a *de facto* priority given to multilateral agency loans and, circumstantially, by differentiating between credits of the official and of the private sector (IMF LIA policy), (IMF 1999). This approach causes uncertainty and concern about «moral hazards», which could be reduced by means of a statutory mechanism with priority rules expressly written (Bolton and Skeel 2007, 3–4).

With specific regards to the 2014 Report, firstly, these agents highlight the transitional problems observed by *contractualists-internalists* themselves. While the proposed models were not actually incorporated in debt contracts and still a stock of outstanding bonds with other types of clauses remains active, *contractualists-internalists* note, a transitional period with a certain degree of uncertainty and possible inequities in the SDR field is expected (Makoff and Kahn 2015, 6), which –*statutarists* add– could be avoided with the creation of a statutory mechanism (Ranieri 2015).

However, this position goes a step further by also tying these transitional problems to the nature of the contractual approach itself. The probability that a sovereign restructuring works properly is related closely to the ability of a debtor, in the same process, to relate creditors holding bonds with organizational clauses written in «identical manner» (Ranieri 2015, 285). The new “single-limb” CACs extend this requirement not only to a particular bonds series but to all bond series that the debtor wishes to aggregate in a restructuring. The problem is that each credit operation is *a priori* an independent act of other credit operations. The parties negotiate the content of their clauses in each operation in a decentralized manner; they could or not adhere to the new models, or adhere but modifying them. Also, it is relevant to observe that these models were designed exclusively for bonds governed by New York and England Laws (IMF 2014b, 6). All these considerations make it difficult to assure that, as a matter of fact, the contractual clauses in future will effectively have identical wording; in fact, the 2014 Report itself accepts that the wording of the clauses varies according to the practices of different jurisdictions (IMF 2014b, 6). Consequently, *statutarists* warn that the IMF contractual approach offers, in essence, a higher degree of uncertainty than the statutory approach which would involve the same set of rules for all the cases to be conducted under its domain. Again, they observe that this degree of uncertainty grows the more complex and heterogeneous the universe of creditors becomes; in particular, –

Krueger asserts– uncertainty grows in cases in which the clauses are subject to the interpretation of different jurisdictions (A. O. Krueger 2002, 32).

Secondly, in this view, the broad *pari passu* clause interpretation, which recently the New York Courts embraced, has a negative impact on the proper organization of SDRs (A. Krueger 2013). Thus, the agents holding this perspective deem the new model of clauses proposed by the 2014 Report as a step forward, although insufficient.[25] Unlike *contractualists-internalists*, these agents are strongly against vulture funds without considering the particularities of the cases in which they operate, and associate the vulture funds existence to the lack of a statutory mechanism (A. Krueger 2013). Corporate bankruptcy laws, *statutarists* note, accumulate in the same process all the assets and debts of the debtor. One of the essential functions of these laws is to solve economic problems in a collective manner; problems which because of their intensity affect or have the potential to affect the rights stipulated not in one but in multiple individual contracts. Therefore, such laws suspend the legal actions or similar claims individually initiated by creditors during the restructuring process (Bolton 2003). The solution offered by the 2014 Report concerning the *pari passu* clause is understood as insufficient since it gives way to judicial actions during SDR processes, something that increases uncertainty in terms of «holdouts» and «deadweight loss» problems.[26] These *statutarists* propose a legal mechanism that includes *stays* and creates a Forum with specific capacities to solve the particular problems of SDR processes (concerning, for example, credit verification) (A. O. Krueger 2002).

The new CACs models are also seen –in this view– as positive (A. Krueger 2014). The possibility that a qualified creditor majority ties a minority to the terms of an agreement legitimately reached with a debtor is a common feature in corporate bankruptcy laws. The new IMF report aims to replicate via contracts one of the main features of a statutory mechanism: the aggregation of credits from different series in the same restructuring process. In this sense, and as the 2014 Report considers it, the "series-by-series" and "two-limb" CACs reduce but do not eliminate the holdout problem. The *statutarists-internalists´* concerns about the "single-limb" CACs are essentially of practical nature: How can thousands of bonds be assured to have CACs

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[25] This opinion is deduced by the author of this article, following an analogy process through which he extends the general rationale of the *statutarists-internalists* to the concrete case of the quoted new reform.

[26] See, for instance, the argumentation of Buchheit, Gelpern, and Gulati (2013) about this issue.

with identical wordings? How can the clauses of bonds of different laws and jurisdictions be made sure to receive the same interpretation? (A. O. Krueger 2002, 32). These questions, these agents observe, are not just rhetorical. Over recent decades, vulture funds (among other actors) have created essentially innovative strategies to exploit and open fissures in the existing SDR frameworks; only one interpretation in favor of their interests is enough to question the feasibility of large collective processes. Then, the agents in this position intend to complement CACs with statutory uniform rules for SDRs (A. Krueger 2013).

IV–4 Statutory-*externalists* position

The agents of this position propose a statutory mechanism external to the IMF current framework for SDRs. Like *statutarists-internalists*, these agents: a) evaluate the models of contractual clauses by comparing them with other models or contractual clauses but, mainly, keeping in mind a projected statutory mechanism and/or extrapolating the roles of corporate bankruptcy laws to sovereign level (Buchheit, Gelpern, and Gulati 2013); b) claim that the contractual approach does not fully solve the SDR problems, especially in complex and heterogeneous processes (J. E. Stiglitz et al. 2014); c) consider that the current IMF framework makes restructuring unnecessarily expensive without generating practices tending to greater market efficiency (J. Stiglitz 2009, chap. 5, point 68).

Notwithstanding, these *statutarists*, unlike *internalists*, understand that the global economic system is –in the present historical stage of development– inherently contradictory and that the IMF has contributed to producing and deepening its contradictions (J. Stiglitz 2009). This position occupies, in terms of Bourdieu, a heterodox position in the field of the SDR debate: it questions the assumptions which the debate itself is built on and the questions that define it (Bourdieu 2002, 1:120). The main premise of this position considers that the current IMF proposal, although superior to the existing institutional arrangements, makes changes designed to underpin the *status quo* or «to change little or not much» (Alvarez and Adelarde 2015): these agents propose an SDR statutory mechanism as an integral part of a set of reforms to modify the current IFA structures (J. Stiglitz 2009, cap 5).

The rationale behind the present international economic system –it is stated– does not tend, as the IMF pre-assumes, towards equilibrium. In this view, the global financial crisis, the UN Stiglitz Report states, "is the latest and most impactful of several concurrent crises –of food, of water, of energy, and of sustainability– that are tightly interrelated (…): these multiple crises are not the result of a failure or failures of the system. Rather, the system itself –its organization and principles, and its distorted and flawed institutional mechanisms– is the *cause* of many of these failures" (J. Stiglitz 2009, 8). From the standpoint of these agents, what interrelates these crises is an economic doctrine, known as «neoliberalism» or «market fundamentalism», whose theoretical and methodological starting pre-assumptions are, at best, questionable (J. Stiglitz 2009, chap. 1, point 9). Seen this way, these agents observe that an SDR market solution, as that proposed by the IMF, should begin by inquiring whether the required assumptions (following the very doctrine it is built on) for the market to work properly are, in fact, true where the solution intends to be implemented: for this reason, they conclude, a debate over the ideas that deconstruct the barriers artificially drawn by economic orthodoxy (which appears as *The* economy) between an idealized –formal and abstract– market and society is needed (Xercavins 2009, 13).

From this perspective, the global financial system has systematically failed over the recent decades (J. Stiglitz 2009, conclusion, point 19). The gap between a hypothetically atomized and well informed sovereign debt market and a true highly concentrated and heterogeneous market has led to widening the gap between the officially stated and the effectively achieved objectives (J. Stiglitz 2009, chap. 3, point 7). Over the last decades, the financial system expanded its domain over to other social areas, and its failures profoundly impacted on the proper functioning of society at large (J. Stiglitz 2009, chap. 3). In this scenario, the IMF organizes SDRs by means of a framework which –in this view– «absurdly» reduces social reality to an analytical universe that begins and ends in an idealized financial system or, in other words, to a reality in which all variables exogenous to the system appear invisible (J. Stiglitz 2009, 9). Similarly, this framework introduces the correct integration of a State to the financial market as an end in itself and not, as *statutarists* understand should be the case, as a means to pursue other superior purposes (for instance, full enjoyment of human rights).[27]

The IMF plays a key role in the neoliberal financial governance (Harvey 2007). In the 1970s, this organization, following a trial and error process, internalized the new economic orthodoxy and since then has played a prominent role in its dissemination, particularly in moments of crises in emerging markets (Wallerstein 2009). In this sense, this stance considers that the IMF official discourse of a relatively successful restructuring strategy in the 1980s, which lost effectiveness later in the 1990s, is, at best, a biased consideration of the events. Taking the perspective of the territories where the strategy was actually implemented, the results were not very encouraging; in fact, in Latin America, where the IMF intervention acquired maximum intensity, the 1980s are known as "the lost decade" (Ugarchete 2007a). The challenges to neoliberalism over the 1990s did not reach the SDR field. Although, –these agents observe– the IMF has undergone changes in virtually all the areas since the Washington Consensus, the institution continues to promote market deregulation and (neo–)liberalization (Patomaki 2009); on the other hand, it understands the causes of crises by putting aside neoliberalism itself and the market failures (Ugarchete 2012, 45–76, Diana Aguiar; Lee 2012, 122). Following these assumptions, the IMF recent reforms on restructurings –these *structuralists* state– improve but do not increase the existing regulations (Steimberg 2011, 107).

The 2014 Report did not emerge from a fully agreed political process, as the IMF promotes it (Gelpner 2014; Hagan 2014). The current IFA, born in the post-war period, is a financial architecture with a structurally biased power distribution (Ugarchete 2007b). The IMF governance, in particular, provides an institutionally disproportionate representation of the USA and of the G7 countries, something which, in this perspective, is denounced and demands modification (Larralde Hernandez 2014). In this scenario, the 2014 Report arose from a network of relations coordinated by the USA Treasury, the ICMA and the IMF itself (IMF 2014b). Therefore, it is a network of relations which updates, specifically, what Sousa Santos calls "the political matrix of the neoliberal globalization", a matrix which, since the 1970s, the author says, has been interwoven with different arrangements, more or less formal, among the advanced economies

[27] See, for instance, A/HRC/20/23, "Report of the Independent Expert on the Effects of Foreign Debt (…)", 10 April 2011, UN.

official sector, associations of financial corporations and the IFIs mostly controlled by them (Sousa Santos and Rodriguez Garavito 2007, 33). This political matrix, in the particular case, following this view, was only partial or limitedly inclusive; in the matrix, heterodox agents with a potentially different worldview about financial globalization did not participate. More specifically, in the matrix were not represented or, at least, not with significant weight: 1) peripheral and semi-peripheral countries or groups of countries; 2) other associations of financial corporations with headquarters outside the G7 countries territory; 3) associations of non-financial economic agents, workers and civil society (Montes and Wierzba 2015; Stichelmans 2015).

Similarly, *statutarists-externalits* warn against the *contractualists´* statement concerning the lack of consensus to open a debate to draw an SDR statutory mechanism. In this view, this statement can only be considered from within the neoliberal governance (Sousa Santos and Rodriguez Garavito 2007; Lee 2012). In this sense, these agents show that the 2014-2015 resolutions that effectively opened this discussion at the UN were approved at the General Assembly by 124, 128 and 136 countries, and obtained the negative vote of only 11, 6 and 5 countries, respectively, precisely those of the G7 included.[28] Although they had been invited, neither the latter nor the IFIs were part of the Ad Hoc Committee established according to such UN resolutions. Therefore, the agents in this perspective invite a reflection on whether behind the official reasons given by these actors to justify their absence there may be other reasons related to avoiding circumstances perceived as challenging to their global governance dominant position (Mattli and Woods 2009, Heillener Eric).

Like *internalists*, these *statutarists* make a rather large effort to show the limits which –they understand– the contractual approach has to properly organize restructuring processes and, then, justify the need of creating a statutory mechanism (Brooks et al. 2015; Guzman and Stiglitz 2015). In this direction, these agents believe that the residual and fragmented IMF framework for SDRs causes a degree of inconsistency and vagueness which could be avoided with a statutory mechanism specifically designed for restructurings, written complete first attempt. Similarly, they highlight the problems which can probably arise in future SDR processes given the existence of bonds with different models of contractual clauses or with similar models

[28] See, UN Resolutions: A/RES/68/304 (September 9, 2014), A/C.2/69/L.4/Rev.1 (November 22, 2014) and A/RES/69/319 (September 10, 2015).

but with different wording. Even if the new IMF proposed models had good market reception, its contractual nature –*statutarists* point out– would not affect the existing stock of outstanding bonds nor assure that the new models have identical wording or similar interpretations on the part of judges of different jurisdictions. The absence of certainty would not allow –or would not do so to the extent these agents understand a statutory mechanism should– removal of the stigma associated with restructurings to make them faster, timelier, and in more orderly processes (Brooks et al. 2015; Guzman and Stiglitz 2015). With this purpose, the proposals discussed at the UN simplified the SDR activation forms, standardized their stages, set the terms and the finalizing modes.[29]

Also, the agents with this perspective agree with the *statutarists–internalists* that the contractual approach does not achieve results similar to those of a statutory mechanism; Stiglitz thinks that at corporate level the contractual approach would have been adopted if it were the case, but no State worldwide thought it appropriate (J. E. Stiglitz et al. 2014, point 14). These agents mainly emphasize two structural dimensions at the time of justifying this assertion. Firstly, they note that the current sovereign debt market is composed of creditors and of States of particularly heterogeneous nature. The players' homogeneity is the exception rather than the rule (Brooks et al. 2015). Secondly, *statutarists* warn that restructuring processes push agents to compete; agents who seek to maximize their profits and minimize their losses in a scenario of economic distress which, from the start prevent debtors honoring their debts as originally planned. This scarcity situation makes these processes essentially conflictive. Consequently, domestic legal systems remove this kind of processes from Civil or Commercial Law and placed them in legal branches with limitations on full individual autonomy to prevent «the survival of the fittest» (Ranieri 2015). Why then –these *statutarists* ask– should we think that in the sovereign field, where inequality and the complexity of the interests at stake are often higher than in the corporate field, a voluntary and decentralized regulative modality would work efficiently? (J. E. Stiglitz et al. 2014, point 14).

The proposals discussed at the UN, in line with the SDRM and unlike the IMF contractual approach, considered necessary to assure the participation of the international community in restructurings[30] The Fund intervention, as established in its

[29] For instance, see UN proposal by Argentina (2015).

[30] For instance, see UN proposal by Argentina (2015) and UNCTAD (2015).

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current framework, is deemed inadequate. This is so because the IMF: a) is strongly influenced by the advanced economies, particularly with USA prevalence; it is also a creditor and, therefore, involved in a game intended to arbitrate. The principles adopted at the UN require «impartiality» and «independence» (A/RES/69/319 2015, principle 4); b) does not enjoy capabilities and roles designed specifically to manage or coordinate these processes. These *statutarists* propose entities (bankruptcy courts, commissions or forums), equipped with specific instruments to allow them to intervene in SDRs processes timely and in appropriate manner, considering the particular characteristics of their stages (UN proposal by Argentina 2015; Ugarchete and Acosta 2003); c) has proved to be permeable to the pressures of agents with particular interests in these processes. This view reveals that, in highly conflictive events, the IMF tends to orient its decisions not necessarily based on technical criteria, and warns that a statutory mechanism can help to reduce this kind of deviations (PIIE 2014, 33, Schadler Susan).

In particular, this perspective questions the conditionalities of the IMF programs which usually accompany restructurings: a) the negotiation of these conditionalities and the political costs associated with their austerity policies often contribute to the delay of the SDR process implementation;[31] b) the implementation of the conditionalities can undermine basic pillars of the Debtor State democratic system. In practice, the possibilities that a government of a peripheral or semi-peripheral country, heavily indebted and in crisis, operate from outside the IMF are in fact severely restricted considering that the international financial governance was created around the IMF. According to this perspective, in many cases, the Fund has used its strength position to «impose» –rather than «recommend»– conditionalities on debtors, something which trespasses the democratic principles of people sovereignty, government accountability and transparency, and also the autonomy and sovereignty of a State;[32] c) the IMF conditionalities content, following the neoliberal economic doctrine, tends to be counter-productive. The IMF adjustment policies –it is understood– are pro-cyclical and exacerbate the economic downturn of the Debtor State, and those Fund policies directed to liberalize and deregulate its economy expose the State to greater volatility and risk (J. Stiglitz 2009, chap. 1, point 36). Meanwhile, the UN Human Rights Council

[31] See the different opinions about the IMF conditionalities enumerated in (Meltzer 2000).

[32] A/HRC/20/23, "Report of the Independent Expert on the Effects of Foreign Debt (…)", 10 April 2011, UN.

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(HRC) warns against the negative effects that the IMF austerity policies can have on the full enforcement of human rights of the population where the policies are applied.[33]

The IMF framework for SDRs does not expressly recognize the sovereign status of States.[34] Its 2014 Report, like any other contractual regulation, generally equates the State to private agents. Once a contract has been signed, the relations between the involved parties are governed by its regulations. In case of default, the State can be demanded as if it were a private agent: this is, according to the Civil or Commercial Law of the agreed jurisdiction (Ranieri 2015). The State –following this perspective– is an entity ontologically different from a private agent and is not reduced to its government (J. E. Stiglitz et al. 2014, point 2). Among the different roles of a State are those related to the obligation of assuring a set of predefined rights to their population, some of them considered essential to the human condition by the international legal order (Human Rights).[35] Therefore, *statutarists* understand that this confusion in the analysis of the IMF –which treats as similar agents who are essentially not similar and, at the same time, reduces the SDR field to an economic issue that begins and ends in the analytical universe of an idealized financial market– implies negative practical consequences not only for the correct organization of these processes but also for other more transcendent purposes.[36]

The 2014 Report does not equitably distribute the rights and obligations between the parties involved in restructurings (J. Stiglitz 2009, chap. 5). Indeed, this report defines principles in which the Debtor State appears as the active agent of their materialization and the creditors as their recipients or beneficiary agents. Specifically, the Debtor State must act collaboratively in these processes (IMF 2013a, 10), with transparency (IMF 2014b, 31) and in good faith (IMF 2014b, 26) towards creditors. However, the report does no set prescriptions in the opposite direction: that is to say, specific obligations of creditors towards the Debtor State. It is considered that this is not a minor issue if it is noted that not all creditors tend to act collaboratively, in good faith and with transparency in SDR processes; in fact, these *statutarists* claim, certain groups

[33] A/HRC/27/L.26–UN, "Effects of vulture funds (…) on the full enforcement of all Human Rights", 23 September 2014.

[34] On the 2014 Report, this status is only indirectly recognized by quoting the sovereign immunity principle in relation to the USA FSIA. See, (IMF 2014b, 35).

[35] A/HRC/20/23, "Report of the Independent Expert on the effects of foreign debt (…)", 10 April 2011, UN.

[36] A/HRC/27/L.26–UN, "Effects of vulture funds (…) on the full enforcement of all Human Rights", 23 September 2014.

of creditors have institutional incentives to act precisely in the opposite sense.[37] Following these lines, the proposals discussed at the UN suggested a series of measures to prevent these groups from unduly influencing restructurings (UN proposal by Argentina 2015). The IMF report organizes creditors but does not prescribe –unlike such proposals (ex., UN proposal by Argentina 2015)– any joint action among States: in effect, the relations of the restructuring State with other States appear, in the IMF framework for SDRs, always mediated by the IMF itself, whose governance and orientation, it is to be noted, is not neutral (Kulfas and Schorr 2003; Stichelmans 2015, 9).

While *statutarists-internalists* lay stress –aware of the rest of the conflictive issues– on the need of speeding the start of restructurings, these *statutarists* lay the stress on the *too little* issue: States in distress –Guzmán and Stiglitz state– like failing corporations need a *fresh start* (Guzman and Stiglitz 2015, 1). There is –in this view– an institutional bias in the IMF organization and practices which contributes to make SDR processes *too little*: the costs arising from the IMF SDR framework often make the Debtor States delay, in practice, the activation of restructurings (*too late* issue), or accelerate them, but on condition of presenting superficial restructuring offers that suppose only a temporary relief (*too little* issue). When a State wields strong bargaining power, the Fund framework leaves margin to prolong the costs of restructuring over time. One way or the other, debtors tend to maintain serious macro-economic imbalance associated with their high level of sovereign debt, and very often have to re-restructure their debts (Guzman and Stiglitz 2015). The reforms recently approved by the IMF improve but do not solve these problems (Guzman and Stiglitz 2015). For example, the updated Fund debt sustainability analysis is not oriented –as it should be– exclusively to guiding these processes, which makes the decision of restructuring a sovereign debt appear mediated by an analysis that seeks to simultaneously guide a set of relatively autonomous IMF roles (Schadler 2016; UNCTAD 2015). The result is a tight institutional framework that ultimately affects the *too litle* issue (Schadler 2016, 4; UNCTAD 2015, 16). Something similar happens with the last modification of the IMF exceptional access framework (IMF 2015b). The modification seeks to influence the *too*

[37] For example, creditors who have legal claims against the Debtor State and those who own, either directly or via an agent, Credit Default Swaps (CDs) are –from this perspective– part of said groups. See, for instance, Brooks et al. 2015; Guzman and Stiglitz (2015).

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late issue by changing the Fund lending policy. However, in the so-called «grey zone cases» the reform proposes a «debt reprofiling» and rejects a more «definitive type of debt restructuring» (that is to say, a debt haircut or similar), (IMF 2015b, 1). Thus, the modification fixes *a priori* a limit to the depth of the restructuring that is not evaluated in direct relation to the future debt sustainability, and appears essentially mediated by the IMF roles of lender and bailout coordinator.[38] Consequently, the creation of a statutory mechanism specifically designed for SDRs is judged, from this perspective, as fundamental. This mechanism –according to some proposals– should allow the review of the legality of the debt to be restructured and, in some cases, its legitimacy (theory of the "odious debt"), (Olmos 2006).

The IMF framework does not change the role that currently local jurisdictions play in sovereign debt markets. Like *internalists*, these *statutarists* consider that collective restructuring processes tend to meet tension with individual legal proceedings (Guzman and Stiglitz 2015). Nevertheless, these *statutarists* show, at least, two more dimensions of this issue. Firstly, they observe that the IMF Report –by focusing on the New York and England Law bonds– strengthens the role of these jurisdictions in an AFI that structurally distributes power unequally. By means of interventions in restructurings, these States can *internationalize* their own Law system and judicial authority (Ruggie 1982). Considering the prevailing role the jurisdiction of New York plays in the IFA, Piketti defines this role in terms of a "USA juridical hegemonism" that the new IMF proposal, it is reiterated, seeks to reinforce.[39] Secondly, the Fund framework –unlike statutory proposals– fully preserves the structural limits of the jurisdictions which operate in SDR processes. These limits arise from their own local nature: a) the power of jurisdiction of the judges is, by general principle, circumscribed to the territory of the State they belong to and should be used in debt restructuring cases to solve problems which involve actors and capital flows essentially reproduced at global level. The difference of scales ("local jurisdiction vs. global problem"), it is argued, has not only negative consequences for the correct management of the trials themselves, but also for the financial system at large (Halverson Cross 2015); b) sovereign debt contracts do not change over time. Between the moment a credit is

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[38] This opinion is deduced by the author of this article, following an analogy process through which he extends the general rationale of the *statutarists-externalits* to the concrete case of the quoted new reform.

[39] Thomas Piketty, "*Lo que sufre Argentina por el hegemonismo jurídico norteamericano* (…)", 30 November 2014, http://www.pagina12.com.ar/diario/elpais/1–260940–2014–11–30.html (visited 20 July 2015).

issued and the moment a creditor brings legal actions, years may pass. During those years, the laws or/and the jurisprudence criteria may significantly change at the local host jurisdiction. Thus, agents (Debtor States and creditors) who operate at global scale are subject to changes intrinsically tied to the particular dynamism of that local jurisdiction (Barry 2015). In practice, actors, with vested interests, strategically set domestic networks to orient the changes to their own benefit (Kupelian and Rivas 2014). Based on these assumptions, *statutarists* consider the IMF reforms associated with the new contractual models as positive but superficial, and propose different measures to limit the influence of local jurisdictions on restructurings (UN proposal by Argentina 2015).

The 2014 Report does not expressly recognize «vulture funds» which are included, without naming them, in the generic categories of "holdouts" or "litigating creditors" (IMF 2014b). The agents holding this view argue that the vultures fund issue cannot be reduced, as the IMF does, to the economic dimension and to a collective action problem; the mere existence of these funds –which within the system itself is presented as rational– is the proof and the result of multiple system irrationalities.[40] Therefore, *statutarists* propose to address this issue from a different worldview and as part of a set of comprehensive reforms.[41] Specifically related to restructurings, these agents assess the IMF contractual solution insufficient to face their particular nature: vulture funds are not ordinary litigating creditors or holdouts; they are actors with a series of specialized resources which have allowed them not only to use the ambiguities of the system but also to stretch its limits to their benefit. Why –these *statutarists* ask– should we think, for example, that the new model of *pari passu* clauses will mean a sufficient barrier to contain these funds, when it was them who, in a particular historical context, redefined the long-term established traditional meaning and use of the *pari passu* clauses? A voluntary solution, as the one proposed, makes a degree of uncertainty fertile for these funds while it maintains the majority of the institutional factors which enable their existence and practices (J. Stiglitz 2014).

40 See, A/HRC/27/L.26 "Effects (…) of all human rights: the activities of vulture funds", 23 September, 2014; A/HRC/14/21, 2010, Report of the Independent Expert about Vulture Funds", 29 April 2010, Cephas Lumina, HCR UN; Jubilee USA Network, (2008), "Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses", Briefing Note, 4 April, 2008; UN HRC, (2015), "Vulture funds and human rights", Remarks by Juan Pablo Bohoslavsky Independent Expert, 14th session of the Council Advisory Committee, 25 February, UN.

41 Ibid.

The principles adopted at the UN expressly encourage the incorporation of CACs in future sovereign debt issues (A/RES/69/319 2015, principle 9). However, *statutarists* observe that the new "single–limb" CACs do not solve all the restructuring problems and leave margin for a number of questions related to aggregation: "How can –Brooks asks– bonds issued in different denominations be assessed? With different maturities? With different seniorities? How expansive is the list of creditors? Several key inter-creditor issues –such as voting rights across different classes of creditors, or the potential for a majority to deprive minority creditors of their rights– are left unaddressed" (Brooks et al. 2015, 8).

V– Final considerations

This article, contrary to what most of the literature maintains, considers that the categories *contractualist* vs. *statutarists* are not enough to fully understand the SDR debate. In these categories, there are perspectives with significant differences: without a deep comprehension of these differences, there is no explanation why observers of the same social phenomenon –the IMF proposal– have not only diverse but just opposite opinions about it. In this sense, it is argued that the SDR debate is not neutral: this is so not only because of the different interests and worldviews at stake, but also because of the practical implications concerning the sovereign debt market. However, the debate is not either reducible to a purely ideological debate: the way in which the participants in the academic field dispute the organization of restructuring processes follows its own rules which cannot be fully compared to those in the economic and political fields.

The analysis of this area of the academic field shows that despite the widespread use of the "contractual *vs.* statutory approach" dichotomy, in the literature there is not a unique criterion at the time of defining said conceptual pair. In this context, the performed review of the literature is judged relevant since it gives the reader a synthesis of the most often used «defining criteria». More importantly, the article has inquired into the «classificatory criteria» by means of which the participants in the SDR debate are grouped and differentiated. The degree of generalization of the chosen classificatory criterion (*internalists* vs. *externalists* to the IMF framework for

SDRs) in relation to other similar academic works will largely depend of the role that the authors of these works give to the Fund in their analysis.

The study of the classificatory criteria helps with some relevant considerations about the dynamics of the SDR academic field: a) the possibility of visualizing elements of the *republican* vs. *democrat* ideal types in a debate at global scale shows the weight that the USA academic field has in this area; b) the idealized categories *universalists* vs. *territorialists* of the cross boarder corporate bankruptcies debate make no sense in the SDR debate in the absence of bankruptcy laws for Sovereign States. The outlined criticisms in this paper about the role of local jurisdictions in sovereign restructurings can help to enrich the theoretical discussions in relation to the benefits of replicating in this area the *universalist* position (Makoff 2015); c) only by choosing a reference to compare the contents of a given regulative modality can an observer assert that such modality is pro-debtors or pro-creditors. However, in practice, the analyzed *externalist* positions –and largely because of their initial assumptions– placed *a priori* the contractual and statutory approaches in one of these two extremes; d) the *advanced* vs. *emerging countries* ideal types make sense when the SDR debate is thought in terms of a dispute over the global financial governance; e) the defining elements of the *orthodox* vs. *heterodox* idealized categories are visible particularly in the presented *externalist* positions. From the perspective of one of these positions, the other three remaining positions here addressed are considered *heterodox* or *orthodox*, respectively.

The definition of the IMF framework for SDRs is a complex task in itself. This is so because its content is defined by means of the interrelation of multiple parts which vary over time in a relatively independent manner. The performed analysis contributes to show two historical regularities of this framework: a) not all its component parts have the same value: the IMF organizes SDR processes by means of its «lending policy». This obeys the peculiarities of its historical origin; indeed, the SDR framework emerged as a result of the redefinition of the Fund's position concerning *bailouts* after the crises of emerging countries in the late 1990s and early 2000s; b) the global crisis did not mean a paradigm shift in relation to the IMF role and worldview about restructurings. The changes made on the basis of the 2013 Report seek to make more efficient –but not to replace– the parts that give content to the IMF framework emerged in the early 2000s; nor do they seek, considering a broader timescale, to replace the IMF pillars built after the fall of the Bretton Woods agreement.

More specifically, the performed analysis helps to show that the said framework sets in motion the following interrelated parts to organize restructurings: a) the IMF exceptional access policy has significance at the start of these processes and defines the participation of the international community in them, represented by the Fund itself. In general terms, it may be said that when a sovereign debt is deemed unsustainable, the IMF recommends its rapid restructuring and provides support to the process with a lending program. The last reform to the policy seeks to reduce the delays related to the activation of recent SDR processes (or, in other words, to promote "preemptive" restructurings); b) the DSA aims to provide objective and technically precise elements to support the IMF decisions avoiding its possible politicization: in effect, the DSA ties the when, how and how much restructuring of a sovereign debt to a complex calculation of its sustainability. The data that allow this calculation come mainly from the exercise of the IMF surveillance role over the economies of its member-states. Then, the DSA enjoys the power of influencing a given restructuring process without needing to resort to the IMF and its lending policy; c) the Fund conditionalities are related to the control of those aspects of the Debtor State economic policy that the IMF deems critical in SDR cases and in their immediately following stage. The conditionalities also help to calculate the efforts of the different participants in restructurings. The reforms of 2002 and 2009 were mainly directed to avoid a possible Fund interference in areas of States not considered by it as strictly necessary; d) the LIA policy becomes relevant in those cases in which the restructuring State has already incurred in arrears with its creditors. The Fund aims to provide financial support even to post-default processes, although following certain conditions. These conditions seek to encourage good practices of the member-states in SDRs. The LIA policy also intends to promote, indirectly, the participation of official agents in the financing of those States in economic distress. The last modification is directed to shorten the breach between these agents and the private ones.

In fact, the IMF framework does not regulate SDR processes. It influences or aims to influence all aspects of SDR organization by means of regulating the Fund practices, taking into consideration its central role in the global financial governance. Who regulates restructurings in this context is, actually, «the market»: indeed, the IMF leaves to the Debtor State and its creditors the power to decentralize and voluntarily set the rules they will use to proceed in these cases according to the contracts of debt issuance. The 2014 Report precisely seeks to condition the wording of these contracts by making available to them new models of *pari passu* clauses and CACs. These models are constructed in order to solve collective action problems detected by the IMF in the latest restructurings.

The performed analysis also helps to assert that all the involved participants in the SDR debate agree to considering that the 2014 Report potentially achieve its purpose: the proposed models of clauses in it are in theory more efficient than the existing models at the time of managing collective action problems, although –it is worth mentioning– *contractualists-externalists* believe the problems are not such, or not really significant. However, the participants also agree that the IMF initiative leaves some degree of uncertainty concerning future SDR processes: the «depth», «significance» and «implications» of such uncertainty in the sovereign debt market vary considering the pre-assumptions and interests of each of the addressed positions.

For the *contractualists-internalists,* this uncertainty is mostly associated with a «transition period» in which the market players could be reluctant to adopt the new proposed models or in which, even adopting them, the new models will coexist with the existing ones. From this perspective, this uncertainty is regarded as a foreseen risk of the chosen contractual approach itself, which should be assessed according to the potential achievements and considering that a statutory alternative is politically not feasible yet undesirable because of the unpredictable consequences for the proper functioning of the financial market. The manner in which this uncertainty may affect future SDR processes –it is considered– will largely depend on how judges interpret the *pari passu* clauses in subsequent years and on the speed at which the proposed models be spread; exchange of the stock of already issued bonds is advisable.

The significance of the uncertainty is closely related, for *contractualists-externalists*, to the manner in which the new IMF proposal weakens «market discipline» and «creditors´ rights» in SDRs. In this regard, the uncertainty should be assessed as part of a historical period in which creditors have (serious) difficulties at the moment of enforcing their rights and in which, simultaneously, Debtor States enjoy better chances when they have the opportunity to modify creditors' rights. The impact of the implementation of the IMF initiative on the proper functioning of the market will largely depend on whether the sovereign risk alteration is similarly reflected in an alteration of the lending costs. If such alteration is not the case, or not made in the corresponding proportion, following the free market logic, in the near future there will be sovereign under- or over-borrowing, which may result in new financial crises.

Both *statutorist* positions, although with different worldviews and interests, consider that the new IMF proposal leaves a greater degree of uncertainty than the degree assessed by its supporters to the extent that, on the one hand, in practice, the proposal will hardly reach the theoretically expected benefits; on the other, the framework the proposal is based on does not offer solutions to certain key SDR problems. These positions associate the level of uncertainty not only to a transitional period but also to the nature of the IMF contractual approach itself; the approach loses efficiency in complex processes, and establishes relations among structurally heterogeneous agents which are intrinsically conflictive; uncertainty is also related to the residual, fragmented and incomplete character of the IMF framework for restructurings. *Statutarists* consider that uncertainty makes future SDR processes unnecessarily unpredictable, affecting, then, the proper functioning of the sovereign debt market.

In this way, the article offers a road map to the SDR debate, which was drawn trying to avoid –certainly without having fully achieved it– the preferences of a researcher who analyzes the academic field where he interacts.[42] The criteria used to create the positions shown in Table 1 could themselves be a matter of discussion; also, each of the addressed positions has its own internal divisions that this paper, for practical reasons, made invisible. Making explicit the pre-assumptions and interests –usually implicit– *where* the SDR debate participants *speak from* is considered a good starting point at the moment of going deeper into the exercise introduced here.

[42] When researchers, Bourdieu says, study their own universe, they must be aware of three types of bias that will accompany the research. Such biases arise from: a) the social and scientific route involving the researcher; b) the assumptions implicit in the concepts used; c) the temptation to use their construction to promote their own interests in the academic field. The struggle against these biases supposes an inexhaustible process of self-reflection and, therefore, a process which will never reach the point where it is possible to contemplate all the field partial perspectives without getting trapped in one of such perspectives, (Moreno Pestaña 2013, 152–53).

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